

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
2 WESTERN WASHINGTON REGION
3 STATE OF WASHINGTON
4

5 WEYERHAEUSER COMPANY, WASHINGTON
6 AGGREGATES AND CONCRETE ASSOC., INC.,
7 ALPINE SAND & GRAVEL, INC., GLACIER
8 NORTHWEST, INC. dba CALPORTLAND,
9 GRANITE CONSTRUCTION COMPANY, MILES
10 SAND & GRAVEL COMPANY, QUALITY ROCK
11 PRODUCTS, INC. AND SEGAL PROPERTIES,
12 LLC.

12 Petitioners,

13 v.
14

15 THURSTON COUNTY,

16 Respondent.
17

CASE NO. 10-2-0020c

**AMENDED FINAL DECISION
AND ORDER**

18
19 The Board has issued this Amended Final Decision and Order as a result of Motions for
20 Reconsideration filed by Thurston County, Segale Properties LLC and Washington
21 Aggregates and Concrete Assoc. An Order on Motions for Reconsideration was issued
22 concurrently with this amended order which granted those aspects of the Segale and WACA
23 motions involving abandonment of issues. Consequently, this amended order reflects the
24 fact that many such issues are no longer deemed abandoned.
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27 The remainder of the parties' motions were denied. However, based on further legal
28 analysis occasioned by the motions, the Board has concluded no violations of RCW
29 36.70A.060 were established by Petitioners. That determination is primarily reflected in the
30 revised analysis of Issues 11, 12 and 13.
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I. SYNOPSIS

This decision addresses challenges to Thurston County's adoption of Resolution No. 14401 and Ordinance No. 14402 which constituted revisions of its mineral resource lands designation criteria and applicable development regulations. In this Final Decision and Order, the Board finds the County failed to comply with RCW 36.70A.035(2) as significant amendments to the Resolution and Ordinance were adopted subsequent to public hearing.

Petitioners met their burden to substantiate challenges based on RCW 36.70A.170 as there is an inadequate record to support the County's consideration of the minimum guidelines of WAC 365-190-020 and WAC 365-190-070.

The County requirement that a property owner obtain a Washington State Department of Natural Resources reclamation permit prior to designation of the owner's property as mineral resource land resulted in a violation of RCW 36.70A.060 in light of the County's stipulation to that effect.

A violation of RCW 36.70A.172 resulted from the County's failure to apply best available science when adopting regulations designed to protect critical areas.

Finally, the Board determines the County was not guided by RCW 36.70A.020(8), the GMA's Natural Resource Industries goal, but declines to impose invalidity.

II. PROCEDURAL BACKGROUND

Petitions for Review

Petitions for Review (PFR) were filed by Segale Properties, LLC (Segale) and Washington Aggregate and Concrete Association, et al (WACA) on November 22, 2010 and by

1 Weyerhaeuser Company (Weyerhaeuser) on November 23, 2010.¹ The PFRs challenge
2 Thurston County's (County) adoption of Resolution No. 14401 and Ordinance No. 14402.

3
4 *Hearing on the Merits*

5 The Hearing on the Merits was held on April 13, 2011, in Olympia, Washington. Board
6 members Nina Carter, James McNamara and William Roehl were present; Board Member
7 Roehl presiding. Weyerhaeuser appeared through its attorney, Alexander W. Mackie;
8 Segale appeared through its attorneys, Andrew Lane, Jami Balint and Nancy Rogers, and
9 WACA appeared through its attorney, Ramona Monroe. Jeffrey Fancher and Veronica
10 Warnock appeared on behalf of Thurston County.
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13 **III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF,**
14 **AND STANDARD OF REVIEW**

15 Comprehensive plans and development regulations, and amendments, are presumed valid
16 upon adoption.² This presumption creates a high threshold for the Petitioners as they have
17 the burden to demonstrate that action taken by Thurston County is not in compliance with
18 the GMA.³
19

20 The Board is charged with adjudicating GMA compliance and, when necessary, invalidating
21 noncompliant plans and development regulations.⁴ The scope of the Board's review is
22 limited to determining whether Thurston County has achieved compliance with the GMA
23 only with respect to those issues presented in a timely petition for review.⁵ The GMA directs
24 the Board, after full consideration of petitions, to determine whether there is compliance with
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27 ¹ The Washington Aggregates PFR included Alpine Sand & Gravel, Inc., Glacier Northwest, Inc. dba
28 CalPortland, Granite Construction Company, Miles Sand & Gravel Company, Quality Rock Products, Inc. and
29 Segale Properties LLC as co-petitioners.

30 ² RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable
31 development regulations] comprehensive plans and development regulations, and amendments thereto,
32 adopted under this chapter are presumed valid upon adoption.

³ RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] the
burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this
chapter is not in compliance with the requirements of this chapter.

⁴ RCW 36.70A.280, RCW 36.70A.302

⁵ RCW 36.70A.290(1)

1 the requirements of the GMA.⁶ The Board is directed to find compliance unless it determines
2 that the challenged action is clearly erroneous in view of the entire record before the Board
3 and in light of the goals and requirements of the GMA.⁷ In order to find the County's action
4 clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake
5 has been committed."⁸
6

7 In reviewing Thurston County's planning decisions, the Board is instructed to recognize "the
8 broad range of discretion that may be exercised by counties and cities" and to "grant
9 deference to counties and cities in how they plan for growth."⁹ However, Thurston County's
10 actions are not boundless; those actions must be consistent with the goals and
11 requirements of the GMA.¹⁰
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14 Thus, the burden is on the Petitioners to overcome the presumption of validity and
15 demonstrate the action taken by Thurston County is clearly erroneous in light of the goals
16 and requirements of the GMA.
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21 ⁶ RCW 36.70A.320(3)

22 ⁷ RCW 36.70A.320(3)

23 ⁸ *City of Arlington v. CPSGMHB*, 162 Wn.2d 768, 778, 193 P.3d 1077 (2008)(Citing *Dept. of Ecology v. PUD*
24 *District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also, *Swinomish Tribe, et al*
25 *v. WWGMHB*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB*, 157 Wn.2d 488,
26 497-98, 139 P.3d 1096 (2006).

27 ⁹ RCW 36.70A.3201 provides, in relevant part: In recognition of the broad range of discretion that may be
28 exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the
29 boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements
30 and goals of this chapter. Local comprehensive plans and development regulations require counties and cities
31 to balance priorities and options for action in full consideration of local circumstances. The legislature finds that
32 while this chapter requires local planning to take place within a framework of state goals and requirements, the
ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and
implementing a county's or city's future rests with that community.

¹⁰ *King County v. CPSGMHB*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000)(Local discretion is bounded by the
goals and requirements of the GMA). See also, *Swinomish*, 161 Wn.2d at 423-24. In *Swinomish*, as to the
degree of deference to be granted under the clearly erroneous standard, the Supreme Court stated: The
amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give
the [jurisdiction's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and
capricious standard. *Id.* at 435, Fn.8.

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2 **IV. BOARD JURISDICTION**

3 The Board finds the Petitions for Review were timely filed pursuant to RCW 36.70A.290(2)¹¹;
4 the Petitioners have standing to appear before the Board pursuant to RCW
5 36.70A.280(2)¹², and; the Board has jurisdiction over the subject matter of the petitions
6 pursuant to RCW 36.70A.280(1).
7

8 **V. ISSUES AND DISCUSSION**

9 *The Challenged Action*

10 The Petitioners include companies engaged in the production and/or processing of sand,
11 gravel, rock, ready mix, asphalt and related products throughout Thurston County, a trade
12 association representing those and other similar businesses and a company which owns
13 extensive forest resource lands in Thurston County, lands which also potentially include
14 mineral resources.
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17 The County engaged in a lengthy process analyzing and amending its mineral resource
18 lands designation criteria together with locational criteria for mineral extraction and asphalt
19 production. The County's process culminated in late September 2010 with the adoption of
20 Resolution No. 14401 and Ordinance No. 14402 (the Resolution and/or Ordinance).
21

22 The Resolution amended Chapter Three of the Thurston County Comprehensive Plan-
23 Mineral Resource Lands of Long Term Commercial Significance. The Ordinance amended
24 Chapter 20.30(B) of the Thurston County Code, the criteria and process for designation of
25 Mineral Resource Lands of Long Term Commercial Significance. The primary focus of the
26 challenges involves the designation criteria and the application of those criteria in
27 designating mineral resource lands although other issues include allegations regarding
28 public participation, consistency and critical areas violations.
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32 ¹¹ Notice of Adoption of the Resolution and Ordinance was published on September 24, 2010.

¹² Petitioners participated orally, in writing and/or participated in the County's Mineral Lands Task Force or its
Asphalt Advisory Task Force.

1 During the Prehearing Conference the Presiding Officer agreed to allow the Petitioners to
2 divide the issues for purposes of briefing in light of their agreement to limit the lengths of
3 briefs. The Petitioners also cooperated to reduce the number of issues presented through
4 consolidation, clarification and categorization. The subject categories included GMA Goals,
5 Public Participation, Internal Consistency, Minimum Guidelines, Conservation of Mineral
6 Resources, Consideration of New Information, Designation of Mineral Resources, Critical
7 Areas and Property. This Final Decision and Order addresses all the Issues presented
8 although some of those issues have been included for purposes of discussion within other
9 categories as they and the argument from both Petitioners and the County overlap.
10 Additionally, although the Petitioners' categorization included three issues in a section
11 entitled Goals, many other issues reference the RCW 36.70A.020 goals as well. For
12 purposes of discussion and analysis, all alleged goal "violations" will be addressed in one
13 section of this FDO.
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17 **A. Public Participation: Issues 4 and 5**

18 **Issue 4.** Did the adoption of Resolution 14401 and Ordinance 14402 fail to comply with the
19 public notice and public participation requirements of RCW 36.70A.020 (11), RCW
20 36.70A.035, and RCW 36.70A.140 by failing to provide an opportunity for public comment
21 after changes were made to Resolution 14401 and Ordinance 14402, failing to provide
22 adequate notice of the proposed amendments, and failing to follow its adopted public
23 participation program? (Segale 3.10; WACA 3.14)

24 **Issue 5.** Whether the adoption of a prohibition against mining in designated forest lands
25 violated GMA and other statutory requirements for public participation and additional public
26 hearings, and hence is not in compliance with the GMA, specifically including RCW
27 36.70A.035(1) and (2)(a); RCW 36.70A.140; RCW 36.70.430-440 and Chapter 43.21C
RCW? (Weyerhaeuser A, B, and C¹³)

28
29 Issue 4 was raised by WACA and Segale but neither briefed this issue in their opening
30 briefs. Therefore, pursuant to WAC 242-02-570(1), they are deemed to have abandoned it.
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¹³ All parenthetical references are to the issues as numbered in the original petitions for review.

1 ¹⁴ WACA did address Issue 4 in its Reply Brief. However, not only was that briefing
2 inadequate, but an issue raised and argued for the first time in a reply brief does not warrant
3 consideration.¹⁵ Issue 4 will be dismissed in its entirety. On the other hand, a somewhat
4 similar claim was raised by Weyerhaeuser with Issue 5 and will be addressed.

5
6 Weyerhaeuser fails to support its Issue 5 allegations of violations of RCW 36.70A.035(1),
7 RCW 36.70A.140, RCW 36.70A.440 and Chapter 43.21C RCW(SEPA). Consequently,
8 those allegations are also deemed abandoned. Its argument on that issue is limited to RCW
9 36.70.430 and RCW 36.70A.035 (2).
10

11 Applicable Law

12 RCW 36.70A.035(2), in relevant part, provides:

13
14 (2)(a) Except as otherwise provided in (b) of this subsection, *if the legislative*
15 *body for a county or city chooses to consider a change to an amendment to a*
16 *comprehensive plan or development regulation, and the change is proposed after*
17 *the opportunity for review and comment has passed under the county's or city's*
18 *procedures, an opportunity for review and comment on the proposed change*
19 *shall be provided before the local legislative body votes on the proposed change.*

20 (b) *An additional opportunity for public review and comment is not required under*
21 *(a) of this subsection if:*

22 (ii) *The proposed change is within the scope of the alternatives available for*
23 *public comment;*

24 Positions of the Parties

25 Weyerhaeuser suggests the basic question raised by Issue 5 is whether the Thurston
26 County Board of County Commissioners (BOCC) may change a Planning Commission
27 recommendation following the close of public comment without remand to the Planning
28 Commission for additional consideration and public hearing.¹⁶ It argues RCW 36.70.430, a
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31 ¹⁴ WACA and Segale did incorporate the arguments of each other as well as those of Weyerhaeuser.

32 However, Issue 4 was raised by WACA and Segale and it was incumbent upon them to address this issue.

¹⁵ *Cowiche Canyon Conservancy v. Bosely*, 118 Wn.2d 801, 809 (1992).

¹⁶ Weyerhaeuser Prehearing Brief at 2.

1 provision of the Planning Enabling Act (PEA), and RCW 36.70A.035 (2) both mandate a
2 remand to the Planning Commission.¹⁷

3
4 The Planning Commission made a comprehensive plan amendment recommendation to the
5 BOCC that allowed mining on forest resource lands.¹⁸ Thereafter, the BOCC held a public
6 hearing on April 22, 2010, followed by staff briefings.¹⁹ On June 16, 2010, the BOCC
7 changed the draft resolution and ordinance language to prohibit mining on designated forest
8 resource lands.²⁰ Weyerhaeuser states that at no time during the County's six-year
9 consideration of mineral resource lands was such a prohibition ever publicly discussed and
10 the first public proposal arose nearly two months following the BOCC's sole public hearing.²¹
11 It is Weyerhaeuser's position that a change of that magnitude required referral back to the
12 Planning Commission and failure to do so resulted in violations of RCW 36.70.430 and
13 RCW 36.70A.035(2).
14
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16 The County first outlines the extensive public process that led to the ultimate adoption of the
17 Resolution and Ordinance. It refers to the multi-year process which involved the Mineral
18 Lands Task Force (MLTF), the Thurston County Planning Commission (TCPC) and the
19 Board of County Commissioners (BOCC), all of which provided an extensive opportunity for
20 public input. Ultimately, the County argues it merely adopted a variation of the proposal that
21 had been considered at the BOCC public hearing held on April 22, 2010. The County's basic
22 argument is the change from dual designation of MRL and Forest Lands to a preclusion of
23 dual designation was within the "scope of the alternatives available for public comment",
24 RCW 36.70A.035 (2)(b)(ii). In support of that proposition, the County observes that it's
25 criteria for designation of mineral lands was the focus of its years-long process and the
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31 ¹⁷ Id.

32 ¹⁸ Exhibit 28, pgs. 3 and 8

¹⁹ Exhibits 47, 48, 49 and 50

²⁰ Exhibit 50

²¹ Weyerhaeuser Prehearing Brief at 3

1 consideration of those criteria encompassed both options: dual designation or no dual
2 designation.²²

3
4 Board Analysis and Findings

5 As previously noted, RCW 36.70.430 is a provision of the PEA. The Board only has
6 jurisdiction to determine whether a state agency, county, or city planning under RCW
7 36.70A is in compliance with the requirements of the statutes expressly provided for in RCW
8 36.70A.280 – the GMA, the SMA, and SEPA. The Board has not been granted jurisdiction
9 to determine compliance with the PEA.²³ Weyerhaeuser cites the recent Court of Appeals
10 decision in *Brinnon Group v. Jefferson County*²⁴, which referred to the *Whatcom County v.*
11 *Brisbane*²⁵ Washington Supreme Court decision holding that RCW 36.70.430 and RCW
12 36.70A.035 (2) must be " . . . read together to determine legislative purpose to achieve a
13 harmonious total statutory scheme." While it is appropriate for the appellate courts to
14 harmonize those two statutes, the legislature has not seen fit to grant the Board with
15 jurisdiction over the PEA. Consequently, the Board will not address alleged violations of
16 RCW 36.70.430-440.
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19 The basis of Weyerhaeuser's argument regarding this issue is an alleged lack of compliance
20 with RCW 36.70A.035. RCW 36.70A.035 requires the county to establish procedures that
21 are reasonably calculated to provide notice to property owners and other affected individuals
22 and entities. More specifically, the challenge presented is: Whether the BOCC was required
23 by RCW 36.70A.035(2) to provide an additional opportunity for review of and comment on
24 the Ordinance and Resolution following the decision by the BOCC to prohibit mining on
25 designated forest resource lands, a decision made subsequent to its public hearing?
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32 ²² Thurston County Prehearing Brief at 8-10.

²³ See *Brinnon Group v. Jefferson County*, Case No. 08-2-0014, FD0, September 15, 2008.

²⁴ *Brinnon Group v. Jefferson County*, Wash. St. Ct. of Appeals, Div. II, Jan. 16, 2011, pg. 16.

²⁵ *Whatcom County v. Brisbane*, 125 Wn. 2d 345, 354.

1 Here, the BOCC held a public hearing April 22, 2010 on the TCPC MRL designation criteria
2 recommendations, recommendations which included the following language to be included
3 in the Comprehensive Plan (emphasis added):

4 Mineral resource lands **may** include lands designated for long-term forestry.²⁶
5

6 The published notice for the BOCC public hearing held on April 22, 2010 stated, in part, as
7 follows:

8 The public hearing is to accept public comment on the adoption of updates to the
9 Comprehensive Plan Chapter 3, natural resources. Specifically this amendment
10 changes the criteria for how property is designated as mineral lands of long-term
11 commercial significance, and the permitting of gravel mines. It addresses the
12 minimum designation criteria such as setback standards, site size, and various
13 environmental considerations.²⁷

14 Thereafter, the BOCC participated with staff in discussing the proposal. During a June 16,
15 2010 briefing, the BOCC changed the language to preclude dual designation (emphasis
16 added):

17 Mineral resource lands **may not** include lands designated for long-term
18 forestry.²⁸
19

20 As this Board has stated on numerous occasions, public participation is the keystone of the
21 GMA. It is imperative that jurisdictions provide notice reasonably calculated to inform the
22 public of the nature and magnitude of proposed changes to comprehensive plans and
23 development regulations.²⁹ In the matter now before the Board, all iterations of the proposed
24 changes allowed dual designation of MRL and Forest Lands up to and including the draft
25 considered at the public hearing on April 22, 2010³⁰ Dual designation was still proposed for
26 allowance at BOCC briefings held on May 19 and June 2, 2010.³¹ Nearly two months
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30 _____
31 ²⁶ Ex. 28, pgs. 3 and 8, draft dated by accompanying transmittal letter of February 17, 2010.

32 ²⁷ Exhibit 47

²⁸ Ex. 50, pgs. 3 and 8.

²⁹ *Panza v. City of Lacey*, Case No. 08-2-0028, FDO at pg. 10.

³⁰ Exhibits 17, 20, 27, 31 and 47.

³¹ Exhibits 48 and 49

1 subsequent to the public hearing, following two BOCC briefings, a version precluding dual
2 designation emerged at a third briefing.³²

3
4 The issue clearly presented is whether or not the change from dual designation to a
5 preclusion of dual designation was within the scope of the alternatives available for public
6 comment and therefore excused the County from providing an additional opportunity for
7 comment under RCW 36.70A.035(2)(b)(ii). The County states that it was considering
8 comprehensive plan and development regulation changes to its MRL designation criteria:
9 "the scope of the proposal was the entire designation process."³³ However, that argument
10 would literally allow any change to the amendments proposed and presented for public
11 hearing. It would be difficult to envision any situation where RCW 36.70A.035(2)(a) would
12 apply. By way of example, the County's proposals precluded the designation of MRL in
13 critical aquifer recharge areas classified as CARA I. Would a decision to reverse that
14 decision and allow MRL designation of CARA I be exempt from the requirement to hold an
15 additional public hearing? To be consistent, the County would have to argue no additional
16 public hearing would be required.
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19 The Board simply cannot agree with that proposition. The "scope" of the published notice
20 was admittedly broad; it simply referred " . . . [to] the criteria for how property is designated
21 as mineral lands of long term commercial significance . . . and . . . minimum designation
22 criteria such as set back standards, site size, and various environmental considerations."
23 The notice specifically referred to the "referenced ordinances and draft regulations" which
24 were available from the County. Those documents provided for dual designation of MRL and
25 Forest Lands. As the Board stated in *City of Lacey*³⁴, the change was of such magnitude as
26 to require additional notice and a public hearing. The question the Board posed in *Friends of*
27 *Skagit County v. Skagit County* and again referenced in *City of Lacey* bears repeating: "How
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32 ³² Exhibit 50, dated June 16, 2010.

³³ Thurston County's Prehearing Brief at 10

³⁴ *Panza v. City of Lacey*, Case No. 08-2-0028

1 many more potential citizen participants were denied the opportunity to comment because of
2 the County's failure to provide adequate notice . . .?"

3
4 The Board finds and concludes the changes to a preclusion of dual designation in
5 Resolution No. 14401 and Ordinance No. 14402 were significant changes from the drafts
6 presented for review and comment at the Board of County Commissioners' public hearing. It
7 was therefore required by RCW 36.70A.035(2) that the County provide the public with an
8 opportunity for additional review and comment. Since that opportunity was not provided a
9 violation of RCW 36.70A.035(2) resulted.
10

11 Conclusion

12 Issue 4 is dismissed.
13

14 In regards Issue 5, the Board concludes that Petitioner Weyerhaeuser has carried its
15 burden of proof in demonstrating the adoption process utilized by Thurston County for
16 Resolution No. 14401 and Ordinance No. 14402 was a clearly erroneous violation of RCW
17 36.70A.035(2) in that a significant amendment to this action was adopted subsequent to a
18 public hearing.
19

20
21 **B. Internal Consistency: Issues 6 and 7**

22 **Issue 6.** Does Ordinance 14402 fail to comply with the requirements of RCW 36.70A.040
23 and RCW 36.70A.070 by including development regulations that fail to implement and are
24 inconsistent with the comprehensive plan policies regarding nuisance protection adopted in
25 Resolution 14401? (Segale 3.13 and 3.14; WACA 3.18 and 3.19)

26 **Issue 7.** Do the Amendments fail to comply with the internal consistency requirements of
27 RCW 36.70A.070 by adopting regulations and policies for mineral resource lands that are
28 inconsistent with the County's critical areas regulations? (Segale 3.12; WACA 3.16)

29 WACA briefed both of these issues, Segale briefed Issue 7 and incorporated WACA's Issue
30 6 argument by reference.
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1 Applicable Law

2 RCW 36.70A.040(3)(d), in relevant part, provides as follows:

3 . . . the county shall adopt a comprehensive plan under this chapter and
4 development regulations that are consistent with and implement the
5 comprehensive plan. . .

6 The preamble of RCW 36.70A.070 states:

7
8 The comprehensive plan of a county or city that is required or chooses to plan
9 under RCW 36.70A.040 shall consist of a map or maps, and descriptive text
10 covering objectives, principles, and standards used to develop the
11 comprehensive plan. *The plan shall be an internally consistent document and all
elements shall be consistent with the future land use map.*

12 Positions of the Parties

13 WACA, in arguing both Issues 6 and 7, states RCW 36.70A.070's requirement of internal
14 comprehensive plan consistency and RCW 36.70A.040(3)'s requirement for development
15 regulations to be consistent with a comprehensive plan have both been violated.³⁵ It asserts
16 the Comprehensive Plan text precludes mining Mima Mounds and CP Policy 8 also
17 precludes alteration of Mima Mounds by mining.³⁶ On the other hand, WACA observes
18 Mima Mounds and other geologic features are not mentioned in the designation criteria in
19 either the Comprehensive Plan or the development regulations. The Comprehensive Plan
20 minimum designation criteria require that mineral resource lands not be located in
21 geologically hazardous areas but the development regulations' do not include any reference
22 to "geologically hazardous areas" or "significant geologic features". It concludes those
23 discrepancies would lead one to wonder "whether either significant geologic features or
24 geologically hazardous areas are relevant to the designation of mineral resource lands."³⁷
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28 Additionally, WACA states Comprehensive Plan Policies 2 and 3 call for protection of
29 mineral resource lands from incompatible uses, while Policies 7 and 9, on the other hand,
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31 ³⁵ WACA's Opening Brief at 18.

32 ³⁶ Mima Mounds, mostly six-to-eight-feet tall, are spread uniformly across hundreds of prairie acres. Their
origins are not yet understood.

³⁷ WACA's Opening Brief at 18.

1 express the intent to protect adjacent uses from mining activity.³⁸ Further, WACA points to
2 development regulations which allow nuisance claims against mining operations
3 notwithstanding Policy 3's intent to protect mining from nuisance claims.³⁹ Another alleged
4 inconsistency is Plan Policy 6, which calls for necessary buffering to be located on adjacent
5 residential property while the development regulations require that the buffers be placed on
6 the mineral resource lands.⁴⁰
7

8 In regards to Issue 6, the inclusion of development regulations that fail to implement and are
9 inconsistent with the Comprehensive Plan policies regarding nuisance protection, the
10 County states it amended prior code language which stated that an individual with notice of
11 permitted mineral extraction activity was precluded from bringing a common law nuisance
12 claim. It is the County's position it had no authority to establish such a bar and the
13 amendment merely clarified that. The amended language now allows the filing of such
14 claims.
15
16

17 While the County makes reference to Issue 7 in the section of its Prehearing Brief where it
18 addressed the allegation regarding critical areas ordinance *de facto* amendments, it fails to
19 specifically address alleged Comprehensive Plan inconsistencies in relationship to Issue 7.
20

21 Board Analysis and Findings
22

23 Although Issue 6 alleges violations of both RCW 36.70A.040 and RCW 36.70A.070, this
24 issue is limited to a challenge based on Ordinance No. 14402 which only adopted
25 development regulations. RCW 36.70A.070 addresses internal comprehensive plan
26 consistency. Consequently, any alleged internal comprehensive plan policy violations in
27 regards nuisance protection are beyond the scope of Issue 6. Alleged violations of RCW
28 36.70A.070 under Issue 6 are dismissed.
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32 ³⁸ Id. at 19

³⁹ Id.

⁴⁰ Id.

1 WACA contends a development regulation, TCC 20.30B.050.2, which provides:

2 Designated mineral resource sites that are being operated in accordance with
3 applicable best management practices and other laws and regulations should be
4 given increased protection from landowners who have been notified of the
5 presence of the long-term mineral extraction site.⁴¹

6 is inconsistent with and fails to implement Comprehensive Plan Policy 3, which provides:

7 An owner or occupier of real property for which notice has been given pursuant
8 to Chapters 14.20, 14.44 or 18.04 TCC may not be limited in bringing a private
9 nuisance claim against a protected, legally operating mine.⁴²

10 The Board does not find any inconsistency. The County's assertion that it lacks the power to
11 deny nuisance claim lawsuits is beyond question. While the quoted sentence of the
12 development regulations may be considered superfluous, its inclusion does not result in an
13 inconsistency with Comprehensive Plan Policy 3. Whether or not the County states
14 nuisance claims are allowed or disallowed makes no difference as the ultimate decision on
15 the legal viability of any such claims lies with the courts. Petitioner WACA has failed to meet
16 its burden of proof in regards Issue 6.
17

18 Issue 7 alleges a violation of RCW 36.70A.070 (Preamble) resulting from adoption of
19 regulations and policies for mineral resource lands inconsistent with the County's critical
20 areas regulations. As previously stated, RCW 36.70A.070 requires the internal consistency
21 of comprehensive plan policies, not consistency between a comprehensive plan and
22 development regulations. An RCW 36.70A.070 (Preamble) claim cannot rest on
23 inconsistency with the County's "critical area **regulations**". Issue 7 is dismissed.
24
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27 Conclusion

28 The Board concludes that Petitioners WACA and Segale have failed to carry their burden of
29 proof on Issue 6 in demonstrating Thurston County's action in adoption of Ordinance No.
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32 ⁴¹ Thurston County Comprehensive Plan Section V, Policy 3, pg.3-27.

⁴² TCC 20.30B.050 2

1 14402 violated RCW 36.70A.040. Allegations of violations of RCW 36.70A.070 under Issue
2 6 are dismissed. Issue 7 is dismissed in its entirety.

3
4 **C. Minimum Guidelines: Issues 8, 9, 10 and 21**⁴³

5 **Issue 8.** Do the Amendments fail to comply with the requirements of RCW 36.70A.050,
6 WAC 365-190-020 and WAC 365-190-070 by failing to apply the minimum guidelines
7 prepared by the Department of Commerce for designating mineral resource lands? (Segale
8 3.2; WACA 3.4)

9 **Issue 9.** Whether the adoption of the prohibition against mining in forest resource lands and
10 particularly the prohibition against expansion of the one of the state's primary Jetty Rock
11 quarries violates the Goals of the GMA to maintain and enhance the mineral resource
12 industry and hence not in compliance with the GMA and specifically Goal 8 of the GMA,
13 RCW 36.70A.020(8); RCW 36.70A.170 (designation); RCW 36.70A.100 (coordination);
14 RCW 36.70A.131 (consideration of information from DNR); RCW 36.70A.060(1)
(protection); and the implementing WAC minimum guidelines published February 2010
(WAC 365-190-010 through -040, 060, 070)? (Weyerhaeuser D & E)

15 **Issue 10.** Whether the failure of the County to accurately assess the mineral resource
16 availability in the County is a violation of the minimum standards for mineral resource
17 designation and as such not in compliance with the GMA and specifically Goal 8 of the
18 GMA, RCW 36.70A.020(8); RCW 36.70A.170 (designation); RCW 36.70A.100
19 (coordination); RCW 36.70A.131 (consideration of information from DNR); RCW
20 36.70A.060(1) (protection); and the implementing WAC minimum guidelines published
21 February 2010 (WAC 365-190-010 through -040, 060, 070) ?(Weyerhaeuser F, G & H)

22 **Issue 21.** Do the Amendments fail to comply with the requirements of RCW 36.70A.020(8),
23 RCW 36.70A.060, and RCW 36.70A.170 by excluding lands with or near certain critical
24 areas from potential mineral resource lands designation and conservation, thus failing to
25 enhance and maintain the mineral resource industry? (Segale 3.15; WACA 3.17)

26 Issue 8 alleges a violation of RCW 36.70A.050 which directs the Department of Community,
27 Trade and Development (now Commerce) to adopt the Minimum Guidelines. That statute
28 does not establish a duty with which local governments are required to comply.⁴⁴ The duty
29 placed on local governments in that regard arises from RCW 36.70A.170(2), the directive to
30

31
32 ⁴³ This Issue was included in a category entitled "Critical Areas". Since much of the argument involves the
Minimum Guidelines it is included here.

⁴⁴ See *RE Sources v. City of Blaine*, Case No. 09-2-0015, Order on Motions (January 5, 2010).

1 consider those guidelines. Consequently, the Board determines WACA and Segale are
2 unable to establish a violation of RCW 36.70A.050 or the referenced WAC guidelines with
3 Issue 8. Issue 8 will be dismissed in its entirety. However, argument presented by Segale,
4 and incorporated by reference by WACA, in support of Issue 8 also was presented in
5 support of Issue 21.
6

7 In Issue 9, Weyerhaeuser alleges a violation of RCW 36.70A.060(1), the obligation to adopt
8 development regulations to assure the conservation of MRL, but makes no argument based
9 on that statute. The Board considers that alleged violation abandoned.⁴⁵
10

11
12 Positions of the Parties

13 Segale addresses Issue 21, and Weyerhaeuser focuses on Issues 9 and 10. Segale's
14 position is that the County established "exclusionary critical areas criteria" which result in the
15 exclusion of nearly all mineral lands of long term commercial significance from consideration
16 for designation.⁴⁶ It is Segale's view that the "exclusionary criteria" prevent the County from
17 applying the minimum guidelines of Chapter 365-190 WAC (hereinafter referred to as the
18 "Minimum Guidelines"). Additionally, Segale states the adopted designation criteria excluded
19 designation of land "predominantly covered by critical areas and/or buffers" contrary to the
20 Board's holding in *Thousand Friends of Washington v. Thurston County*.⁴⁷ It states the
21 decision was not accompanied by any consideration of the Minimum Guidelines reflected in
22 the record.
23
24

25 Segale argues the GMA establishes a "dual obligation" to designate and protect both natural
26 resource lands and critical areas.⁴⁸ Its view is the critical areas exclusion fails to meet that
27 dual obligation which is set forth in WAC 365-190-020(7) and WAC 365-190-040(7).
28

29
30 ⁴⁵ WAC 242-02-570(1)

31 ⁴⁶ Excluded are lands containing delineated wellhead protection areas, Class I or 2 wetlands (including buffers),
32 certain habitat and species areas (including buffers), 100 year floodplains and geologically hazardous areas.

⁴⁷ WWGMHB Case No. 05-2-0002, Compliance Order, April 22, 2009, a case addressing designation of
agricultural lands of long term commercial significance and the overlap of critical areas.

⁴⁸ Segale's Opening Brief at 16.

1 The Minimum Guidelines are also addressed by Weyerhaeuser in relationship to Issues 9
2 and 10, although its briefing argument is considerably broader in scope, blending in
3 consideration of Issues 3 and 16. The latter issues will be addressed in other sections of this
4 Order.

5
6 Weyerhaeuser states it owns 62,000 acres of designated forest resource lands in the
7 County. Adoption of the Resolution and Ordinance precluding dual designation of forest and
8 mineral resource lands prevents Weyerhaeuser from obtaining mineral resource permits on
9 any of that acreage. More specifically, Weyerhaeuser, as the owner of the Columbia Quarry,
10 states the Ordinance and Resolution prohibit expansion of that quarry as the land has been
11 designated forest resource land. Weyerhaeuser also states the County had been aware of
12 the need to expand the quarry for several years, that the quarry provides a unique, not
13 commonly available type of hard rock used in marine jetties and that prohibiting expansion
14 violated, among other requirements, the WAC 365-190-070(4) Minimum Guideline requiring
15 designation of known mineral deposits and mineral deposits not commonly available.⁴⁹
16
17

18 The County takes the position the GMA does not require application of the Minimum
19 Guidelines but rather only consideration of them, citing Board decisions to that effect.⁵⁰ The
20 County states it did consider the Minimum Guidelines throughout the process of developing
21 the designation criteria but jurisdictions " . . . clearly may deviate from the guidelines . . . ".⁵¹
22
23

24 Focusing on critical areas, the County asserts it followed the Minimum Guidelines which
25 require protection of "critical areas even on designated lands", citing WAC 365-190-020(7)
26 and WAC 365-190-040(7).⁵² It states the County's Critical Areas Ordinance applies to all
27 County lands, including MRL. It is the County's position that the Resolution and Ordinance
28
29
30

31 ⁴⁹ Weyerhaeuser Opening Brief at 8-10.

32 ⁵⁰ Thurston County's Prehearing Brief at pg. 11.

⁵¹ Id. at 12

⁵² Id. at 23

1 do not preclude critical area regulation of MRL and that many critical areas are capable of
2 being designated as MRL.⁵³

3
4 In regards Weyerhaeuser's Issue 9 allegation, the County argues its decision to preclude
5 co-designation of MRL and Forest Lands was within its discretion.⁵⁴ It asserts co-
6 designation was considered throughout the process with the MLTF and the TCPC both
7 recommending allowance of co-designation provided there was no net loss of forest lands
8 following reclamation after mining activity ceases. The County then states the decision to
9 preclude dual designation was made by the BOCC following review of "all of the evidence
10 finding there was uncertainty as to whether forest lands could return to their original state
11 after mining and as to the amount of mineral lands located in forest lands."⁵⁵ The County
12 argues preclusion of dual designation is supported by the record and complies with WAC
13 365-195-040(7)(b) of the Minimum Guidelines.
14

15
16 In response to Weyerhaeuser's argument that the County was required by the GMA and the
17 Minimum Guidelines to assess mineral availability and then designate MRL, the County's
18 position is that consideration of designation is only required during a RCW 36.70A.130
19 comprehensive plan required review. It states that review is scheduled for completion by the
20 end of 2014. Its position is it was only amending the County's MRL designation criteria so
21 that those criteria might be utilized during the upcoming comprehensive plan review.⁵⁶
22

23
24 Weyerhaeuser states the record includes no factual support for the County's decision to
25 preclude dual designation. It argues the County's justification for the decision and departure
26 from the Minimum Guidelines was not based on any evidence.⁵⁷ Weyerhaeuser observes
27
28
29

30
31 ⁵³ Id. at 24

32 ⁵⁴ Id. at 18

⁵⁵ Id. at 19

⁵⁶ Id. at 13

⁵⁷ Weyerhaeuser Reply Brief at 6
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1 the County decision to not allow dual designation was based on an unsupported conclusion
2 that mineral resource activity in Forest Lands is incompatible.⁵⁸

3
4 Board Analysis and Findings

5 Although the Petitioners challenge both the adopted MRL designation criteria and the failure
6 to designate⁵⁹ such lands, the Board will first address the designation criteria policies and
7 regulations included within the Resolution at pages 3-16 through 3-18 and the Ordinance at
8 pages 49 through 54.

9
10 The establishment of designation criteria results in the creation of the universe of lands
11 potentially subject to designation as MRL. Application of the criteria through the designation
12 of MRL process as required by RCW 36.70A.170(1) and (2) must result in a GMA compliant
13 decision. That will only occur if the criteria themselves comply with applicable GMA goals
14 and requirements.

15
16
17 First of all, RCW 36.70A.030(8) sets forth the directly applicable GMA goal:

18 (8) Natural resource industries. Maintain and enhance natural resource-based
19 industries, including productive timber, agricultural, and fisheries industries.
20 Encourage the conservation of productive forest lands and productive agricultural
21 lands, and discourage incompatible uses.

22 RCW 36.70A.170, in relevant part, provides:

23 (1) On or before September 1, 1991, each county, and each city, shall designate
24 where appropriate:

25 (c) Mineral resource lands that are not already characterized by urban growth
26 and that have long-term significance for the extraction of minerals; and

27
28 (2) *In making the designations required by this section, counties and cities shall*
29 *consider the guidelines established pursuant to RCW 36.70A.050.*

30
31
32 ⁵⁸ Id. at 6, 7

⁵⁹ The issue of actual designation of MRL under RCW 36.70A.170(1)(c) is considered in Section F of this Final Decision and Order.

1 RCW 36.70A.050 (Guidelines to classify agriculture, forest, and mineral lands and critical
2 areas), in relevant part, provides:

3 (1) Subject to the definitions provided in RCW 36.70A.030, the department shall
4 adopt guidelines . . . to guide the classification of: (a) Agricultural lands; (b)
5 forest lands; (c) mineral resource lands; and (d) critical areas.

6 (2) The guidelines under subsection (1) of this section shall be minimum
7 guidelines that apply to all jurisdictions, but also shall allow for regional
8 differences that exist in Washington state. The intent of these guidelines is to
9 assist counties and cities in designating the classification of agricultural lands,
10 forest lands, mineral resource lands, and critical areas under RCW
11 36.70A.170.

12 Mineral resource lands (MRL) are one of three types of natural resource lands, together with
13 critical areas, that the GMA requires cities and counties to designate and conserve.⁶⁰ The
14 designation and conservation of these natural resource lands prevents the irreversible loss
15 of such lands to development.⁶¹ The importance of natural resource land designation is
16 underscored by the fact designation of natural resource lands is the first imperative of the
17 GMA. Although the *City of Redmond* court referred to agricultural land designation, the
18 same observation would apply to MRL:

19 The significance of **agricultural** land preservation in the **GMA** can be seen in the
20 very timing of key actions mandated in the statute. . . Thus, **GMA** required
21 municipalities to **designate agricultural** lands for preservation even *before* those
22 municipalities were obliged to declare their UGAs [urban growth areas] and adopt
23 comprehensive plans in compliance with **GMA**.⁶²

24 More specifically, RCW 36.70A.170(1) mandates the designation of MRL that have long-
25 term significance. Minerals are defined to include gravel, sand, and valuable metallic
26
27

28
29 ⁶⁰ RCW 36.70A.170. "Natural resource lands are protected not for the sake of their ecological role, but to
30 ensure the viability of the resource-based industries that depend on them. Allowing conversion of resource
31 lands to other uses or allowing incompatible uses nearby impairs the viability of the resource industry." *City of*
32 *Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn. 2d 38, quoting R. Settle and
C. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 UPS Law
Review 867.

⁶¹ *City of Redmond v. CPSGMHB*, 136 Wn.2d 38, 48.

⁶² *Id.*

1 substances.⁶³ MRL are not defined by the GMA; nor does the GMA clarify the phrase "long-
2 term significance for the extraction of minerals". "Long-term *commercial* significance" is
3 defined, and consideration of that definition is appropriate in the context of this case as the
4 Ordinance and Resolution are primarily focused on the commercial extraction of minerals.
5 Furthermore, RCW 36.70A.020(8) addresses the maintenance/enhancement of natural
6 resource "industries".
7

8 "Long-term commercial significance" includes the growing capacity, productivity,
9 and soil composition of the land for long-term commercial production, in
10 consideration with the land's proximity to population areas, and the possibility of
11 more intense uses of the land. RCW 36.70A.030(10)

12 The aforementioned and other GMA provisions establish the following requirements for the
13 designation of MRL, the first five of which would similarly apply to crafting MRL designation
14 criteria:⁶⁴

- 15 1. Lands that are not already characterized by urban growth;⁶⁵
- 16 2. Lands that have long-term significance for the extraction of minerals;⁶⁶
- 17 3. Consideration of the land's proximity to population areas;⁶⁷
- 18 4. Consideration of the possibility of more intense uses of the land;⁶⁸
- 19 5. Consideration of the mineral resource lands classification guidelines adopted by
20 the Department of Commerce;⁶⁹
- 21 6. Consideration of data and information available from the Department of Natural
22 Resources relating to mineral resource deposits.⁷⁰
23
24

25 Issues 9, 10 and 21 challenge the County's consideration of the mineral resource lands
26 classification guidelines. Initially, it is important to clarify that the Minimum Guidelines are
27

28
29 ⁶³ RCW 36.70A.030(11).

30 ⁶⁴ *Moe v. Kittitas County*, EWGMHB Case No. 08-1-0010.

31 ⁶⁵ RCW 36.70A.170(1)(c)

32 ⁶⁶ RCW 36.70A.170(1)(c)

⁶⁷ RCW 36.70A.030(10), WAC 365-190-070 .

⁶⁸ RCW 36.70A.030(10), RCW 36.70A.060, WAC 365-190-070.

⁶⁹ RCW 36.70A.131(c), WAC 365-190-070(2)(b).

⁷⁰ RCW 36.70A.131(1).

1 not requirements.⁷¹ RCW 36.70A.170(2) clearly states the Minimum Guidelines must be
2 "considered".⁷² The Board agrees with the County that jurisdictions are not necessarily
3 required to follow the Minimum Guidelines. However, RCW 36.70A.050 does provide the
4 guidelines are the "minimum guidelines" that apply to all jurisdictions while also allowing "for
5 regional differences that exist . . ."⁷³
6

7 Having said that, it is also clear the Petitioners have the burden of demonstrating action
8 taken by the County was not in compliance with the GMA and the Board is required to find
9 GMA compliance unless it determines the action taken by the County was clearly erroneous
10 in view of the entire record and in light of GMA goals and requirements.
11

12 In adoption of the Resolution and Ordinance it is alleged the County elected to depart from
13 the Minimum Guidelines in several respects.⁷⁴
14

15 1. The County's designation criteria preclude dual designation of forest lands and mineral
16 resource lands⁷⁵ contrary to WAC 365-190-020(5) and WAC 365-190-040(7)(b) which
17 state, in relevant part:

18 WAC 365-190-020(5): The three types of natural resource lands (agricultural,
19 forest, and mineral) vary widely in their use, location, and size. **One type may**
20 **overlap another type. For example, designated forest resource lands may**
21 **also include designated mineral resource lands.**

22 WAC 365-190-040(7)(b): **If two or more natural resource land designations**
23 **apply, counties and cities must determine if these designations are**
24 **incompatible.** If they are incompatible, counties and cities should examine the
25 criteria to determine which use has the greatest long-term commercial
26 significance, and that resource use should be assigned to the lands being
27 designated.

28 ⁷¹ *1000 Friends of Washington v. City of Anacortes*, WWGMHB No. 03 - 2 - 0017 (FDO at 22); *Twin Falls v.*
29 *Snohomish County* CPSGMHB No. 93-3- 0003 (FDO at 44); *Easy v. Spokane County*, EWGMHB No. 96-1-
30 0016 (FDO at 17).

31 ⁷² "Consider" has been defined as follows: "to fix the mind on in order to understand; to think on with care; to
ponder; to study". Webster's New Twentieth Dictionary.

32 ⁷³ *Manke Lumber v. Diehl*, 91 Wn. App. 793, 805.

⁷⁴ The Board will address only those departures from the Minimum Guidelines challenged by Petitioners.

⁷⁵ "Designated mineral resource lands may not include lands designated for long-term forestry." Exhibits 50
and 51.

2. The designation criteria preclude dual designation of some critical areas and mineral resource lands⁷⁶ contrary to WAC 365-190-040(7)(a) and WAC 365-190-020(7) which state, in relevant part:

WAC 365-190-040(7): Overlapping designations. The designation process may result in critical area designations that overlay other critical area or natural resource land classifications. Overlapping designations should not necessarily be considered inconsistent. If two or more critical area designations apply to a given parcel, or portion of a given parcel, both or all designations apply.

(a) If a critical area designation overlies a natural resource land designation, both designations apply. For counties and cities required or opting to plan under the act, reconciling these multiple designations will be the subject of local development regulations adopted pursuant to RCW 36.70A.060.

WAC 365-190-020 (7): It is the intent of these guidelines that critical areas designations overlay other land uses including designated natural resource lands. For example, if both critical area and natural resource land use designations apply to a given parcel or a portion of a parcel, **both or all designations must be made.**

3. The designation criteria arguably require the imposition of buffers on the mineral resource lands rather than on adjacent lands⁷⁷ contrary to WAC 365-190-040 (6) which states, in relevant part:

WAC 365-190-040 (6): The law requires that natural resource land uses be protected from land uses on adjacent lands that would restrict resource production.

The County states the Minimum Guidelines were considered by the MLTF, the TCPC and the BOCC. In support of that assertion, it cites Exhibit 9 (a staff person's meeting notes from

⁷⁶ "Mineral resource lands shall not include delineated wellhead protection areas CARA [critical aquifer recharge areas] 1.

ii. Mineral resource lands shall not include class 1 or 2 wetlands or their protective buffers, but may include class 3 and 4 wetlands." Exhibits 50 and 51.

⁷⁷ "The site shall be separated by a distance of at least 1000 feet from public preserves, which include parks, national wildlife refuges, state conservation areas, wildlife areas, and other government –owned preserves, but excluding exclusive hunting areas. In addition, designated mineral resource lands shall be at least 1000 feet from urban growth areas." Exhibits 50 and 51

1 a MLTF meeting of June, 2005), Exhibits 24, 27, 30 and 49 (2009 and 2010 correspondence
2 from individuals involved in the mineral extraction industry which reference the Minimum
3 Guidelines) as well as Exhibits 28, 51 and 52. Exhibit 28 is the Planning Commission
4 transmittal letter of the proposed comprehensive plan and development regulation
5 amendments that includes the following sentence:

6 The Planning Commission considered the merits of the Task Force, the Sub-
7 Committee, and other information provided by staff and the public during the
8 work sessions, and has made its recommendations accordingly.

9
10 Exhibits 51 and 52 include the BOCC findings set forth in the Resolution and Ordinance
11 which state the BOCC "considered public comments" and that staff "used the information
12 from comments . . . to formulate a recommendation for a preferred approach to [MRL]
13 designation". The County also referenced additional Exhibits during oral argument which it
14 states support its assertion of consideration of the Minimum Guidelines.

15
16 However, a thorough review of the record fails to disclose any specific consideration of the
17 Minimum Guidelines. Exhibit 9, the 2005 MLTF staff meeting notes, does include the
18 following:

19 CLARIFY CRITICAL AREAS AND MINERAL LANDS DESIGNATIONS.

20 We are proceeding appropriately. One parcel can have both designations under
21 the WACs. Dev regs must reconcile multiple designations. READ PASSAGES
22 FROM WACs.

23 WAC 365-190-070, WAC 365-190-040 and WAC 365-190-020 were attached to the meeting
24 notes.

25
26 Nowhere in any of the minutes, or other portions of the record, is there any reference to any
27 further discussion of the Minimum Guidelines by the MLTF, the TCPC or the BOCC,
28 including the findings set forth in the Resolution and Ordinance⁷⁸, the meaning of the
29
30

31
32 ⁷⁸ The Board does not imply the Findings are required to reference the specifics of Minimum Guideline
consideration or departure from them, although that would provide invaluable assistance to a reviewing body.
It is sufficient if that consideration/departure is reflected in the Record.

1 guidelines, the weight to be given them or specific discussions of the decisions to vary from
2 them.

3
4 In *Lewis County v. WWGMHB*, the Washington Supreme Court held the Western
5 Washington Growth Management Hearings Board erred in concluding Lewis County failed
6 to comply with the GMA when it designated agricultural resource lands based, in part, on
7 local farm industry needs. In its analysis, the court referred to *Manke v. Diehl*⁷⁹ with approval
8 and stated:

9
10 In holding that the Board erred, the court relied largely on WAC 365-190-050, a
11 Washington Department of Community, Trade and Economic Development
12 regulation designed to guide counties in determining which agricultural and forest
lands have "long-term commercial significance."⁸⁰

13 After quoting WAC 365-190-050(1), the court then considered the respondents' assertion
14 that neither the GMA nor the WACs authorized consideration of farm industry needs when
15 designating agricultural resource lands:
16

17 While it is true that *no statute specifically authorizes counties to weigh industry*
18 *needs above all other considerations* in designating and conserving agricultural
19 land, this does not mean the GMA prohibits such an approach. As noted above,
20 the GMA's stated intent is to recognize the "broad ... discretion" of counties to
21 make choices within its confines. RCW 36.70A.3201. Because *the GMA does not*
22 *dictate how much weight to assign each factor in determining which farmlands*
23 *have long-term commercial significance, and because RCW 36.70A.030(10)*
24 *includes the possibility of more intense uses among factors to consider, it was*
not "clearly erroneous" for Lewis County to weigh the industry's anticipated land
needs above all else.

25 **However, we do not decide whether Lewis County, in focusing on the**
26 **needs of the local agriculture industry, went beyond the considerations**
27 **permitted by WAC 365-190-050 and RCW 36.70A.030** in designating
28 agricultural lands. Unfortunately, Lewis County's briefs do not explain the extent
29 to which the county applied the specified factors. And while Lewis County
30 Ordinance 1179C does spell out in detail how the county considered WAC 365-
31 190-050 factors in mapping agricultural lands, the record does not indicate
32

⁷⁹ *Manke Lumber Co. v. Diehl*, 91 Wn. App. 793

⁸⁰ *Lewis County*, 157 Wn. 2d 488, 501

1 whether the county used permissible criteria in other decisions not explicitly tied
2 to the WAC factors.

3 In the present case, neither the County's brief nor the record explain the extent to which
4 Thurston County applied the specified WAC factors when crafting its MRL designation
5 criteria. Furthermore, while it is clear the County included designation criteria not specifically
6 tied to the WAC factors, the record contains no discussion, no analysis and no rationale for
7 departing from the Minimum Guidelines.⁸¹ The Board has previously addressed both
8 consideration of the Minimum Guidelines as well as decisions to depart from them.
9

10 Where a local jurisdiction departs from the Minimum Guidelines, the record must
11 contain evidence of the City's "consideration" of the Minimum Guidelines or the
12 statutory direction becomes meaningless.⁸²

13 [T]o comply with RCW 36.70A.170(1)(d), the City should have considered the
14 Minimum Guidelines pursuant to RCW 36.70A.172(2)⁸³ before it adopted the
15 Forest Plan for the purpose of designating FWHCAs and should have explained
16 in the record either why the use of the Forest Plan for designating FWHCAs is
17 consistent with the Minimum Guidelines or how designating the lands as set forth
18 in the Forest Plan was of comparable benefit as the process specified in the
19 Minimum Guidelines. The very limited record submitted by the City does not
20 demonstrate such "consideration" of the Minimum Guidelines.⁸⁴

21 The County cites *Storedahl v. Clark County*, where this Board upheld Clark County's
22 decision to preclude an MRL designation for a known area containing high quality rock
23 within the 100-year floodplain of the Lewis River.⁸⁵ What the County fails to mention is the
24 basis for that compliance decision: " . . . We hold that the County reached its decision to
25
26
27

28 ⁸¹ The Minimum Guidelines were amended in February, 2010. The County observes that the vast majority of
29 the work on crafting the amendments was completed prior to February of 2010, and that it would not be "fair"
30 to require consideration of those revised guidelines, notwithstanding the fact that the Resolution and
31 Ordinance were not adopted until early September, 2010.

32 ⁸² *1000 Friends of Washington v. Anacortes*, Case No. 03-2-0017 (FDO, February 10, 2004 at 14).

⁸³ The Board assumes the statutory reference was a typographical error; the correct reference should have
been to RCW 36.70A.170(2).

⁸⁴ *1000 Friends of Washington v. Anacortes* at 16

⁸⁵ Case No. 96-2-0016c, Compliance Order, Dec. 17, 1997.

1 [ban mining in the 100- year floodplain] by appropriate evidence and analysis".⁸⁶ The Board
2 had initially found Clark County's decision to be noncompliant as:

3 The record reveals that the reasons for the exclusion were "the general fragile
4 character of these areas and some concern about how to manage mining over
5 the long term." While the record reveals what was done, it reveals nothing of
6 why. There was no review or analysis of the effect of mining within the 100 year
7 floodplain . . .⁸⁷

8 Here too the record reveals what was done but the "why" is not based on evidence
9 contained within the record before the Board. To quote the *Storedahl* decision: "There was
10 no review or analysis of the effect of mining . . . ". In regards the preclusion of dual
11 designation of MRL and Forest Lands, the County argues it considered "all the evidence
12 and found that there was **uncertainty** as to whether Forest Lands could return to their
13 original state after mining and as to the amount of mineral lands located in forest lands . . .
14 [T]he overall loss of commercial forestry resources, along with the forest's many secondary
15 benefits, that would result if mining was allowed in Forest Lands was **unknown**."⁸⁸

17 ". . . [Forest] land ceases to have long-term commercial significance [after mining] as it **may**
18 be difficult to reclaim . . . ".⁸⁹

20 The record fails to disclose any specific consideration of the anticipated "overall loss of
21 commercial forestry resources" that would result from dual designation, let alone whether
22 there had been any such significant loss that had resulted from the County's prior allowance
23 of dual designation. There is no analysis of the forest's "many secondary benefits". Basing
24 such decisions on "uncertainty" or on "unknown" results fails to provide sufficient justification
25 for departure from the minimum guidelines, let alone the requirements of RCW 36.70A.170
26 to establish designation criteria that would lead to GMA compliant MRL designations.
27
28

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32 ⁸⁶ *Storedahl* at 3

⁸⁷ *Id.* at 2

⁸⁸ Thurston County's Prehearing Brief at 19, 20.

⁸⁹ *Id.*

1 Finally, “uncertainty” is an insufficient basis on which to reach a conclusion that the two
2 natural resource land designations are incompatible under WAC 365-190-040(7)(b).⁹⁰
3 The County’s argument regarding its decision to deny dual designation of some critical
4 areas and MRL misses the point made by Petitioners. Their point was not that the Critical
5 Areas Ordinance did not overlap with resource land designations. The Board completely
6 agrees with the County’s statement that it is required to protect critical areas “even on
7 designated lands”. Rather, Petitioners’ argument is the designation criteria deny MRL
8 designation of sites which include specifically listed types of critical areas and does so
9 without analysis. Again, the record fails to disclose any specific consideration of the
10 Minimum Guidelines in regards critical areas and fails to provide sufficient justification for
11 departure from those Minimum Guidelines or the requirements of RCW 36.70A.170 to
12 establish designation criteria that would result in GMA compliant MRL designations. WAC
13 365-190-040(7) provides that the “ . . . designation process may result in critical area
14 designations that overlay . . . natural resource land classifications” and that “ . . . if a **critical**
15 **area designation overlies a natural resource land designation, both designations**
16 **apply**”. Additionally, WAC 365-190-020(7) provides “ . . . that critical areas designations
17 overlay other land uses including designated natural resource lands. For example, if both
18 critical area and natural resource land use designations apply to a given parcel or a portion
19 of a parcel, **both or all designations must be made**”.

20
21
22
23 Precluding designation of mineral resource sites that contain CARA 1, class I or 2 wetlands
24 (and their buffers), certain habitat and species areas (and their buffers), as well as 100 year
25 floodplains and geologically sensitive areas, may in fact be justifiable. However, the record
26 fails to provide that justification. See *Storedahl*, supra.

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⁹⁰ If two or more natural resource land designations apply, counties and cities must determine if these designations are incompatible. WAC 365-190-040(7)(b). The Board noted with interest Finding 21, pg. 12, of the Resolution which referenced a Thurston County Hearing Examiner decision on a mining special use permit: “ . . . when the mining operation is completed, the site would be reclaimed as commercial forestland and recreational lakes for wildlife.”

1 The Board finds it is faced with a situation similar to that addressed by the Court in *Lewis*
2 *County*: there is no explanation in the record of the extent to which the County applied the
3 specified factors and, furthermore, the record fails to indicate whether the County used
4 permissible criteria in its decisions not explicitly tied to the Minimum Guidelines.

5 Paraphrasing the question posed by the court in *Lewis County*: **Did Thurston County go**
6 **beyond the considerations permitted by WAC 365-190-020 through -040, -070 and**
7 **RCW 36.70A.030?**
8

9
10 RCW 36.70A.170 establishes a requirement to designate MRL and, although the issue
11 before the Board is consideration of the Minimum Guidelines, as stated previously, it is
12 imperative that application of the designation criteria result in a GMA compliant decision.
13 The criteria and application of the criteria are inextricably intertwined: both must meet the
14 requirements of the GMA, as well as take into consideration the guidance of the GMA goals.
15 The County's argument that it was merely "balancing" the competing goals of the GMA is
16 without merit in the context of these issues. Prior to reaching a stage in the planning process
17 which necessitates a balancing of the GMA goals, jurisdictions must first comply with GMA
18 requirements: See *Quadrant Corporation v. State of Washington Growth Management*
19 *Hearings Board*⁹¹ and *King County v. Central Puget Sound Growth Management Hearings*
20 *Board*.⁹²
21
22

23 The Board agrees with the Central Board's conclusion in *DOE and CTED v. City of Kent*⁹³
24 where it stated:

25 The Board reads these decisions of the Supreme Court and Court of Appeals as
26 establishing the rule that a jurisdiction may not assert the need to balance
27 competing GMA goals as a reason to disregard specific GMA requirements.

28
29 ⁹¹ 154 Wn.2d 224 at 246: *King County* did not rely on the applicable goal in isolation nor did it hold the goals to
30 independently create substantive requirements.

31 ⁹² 142 Wn.2d 543 at 558: Local discretion is bounded, however, by the goals and requirements of the GMA. In
32 reviewing the planning decisions of local governments, the Board is instructed to recognize "the broad
discretion that may be exercised by counties and cities consistent with the requirements of this chapter" and to
"grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals
of this chapter."

⁹³ Case No. 05-3-0034 FDO at 13.
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1 The Central Board further stated:

2 Thus "balancing" and "deference" come into play when GMA mandates have
3 been satisfied.⁹⁴ *Quadrant*, 154 Wn.2d at 246-247.

4
5 In regards Issue 9, the Board finds the record is inadequate to determine whether or not the
6 County's decision to depart from the Minimum Guidelines in precluding dual designation of
7 MRL and Forest Lands, as well as MRL and many critical areas, considered permissible
8 criteria "not explicitly tied to the WAC factors"⁹⁵ or whether the County actually considered
9 the WAC factors (the Minimum Guidelines).

10
11 In regards Issue 21, the Board also finds the record is inadequate to determine whether or
12 not the County's decision to depart from the Minimum Guidelines in precluding dual
13 designation of MRL and many critical areas considered permissible criteria "not explicitly
14 tied to the WAC factors" or whether the County actually considered the WAC factors. While
15 appropriate analysis could possibly support the County's decisions, here the Board is
16 presented with no apparent consideration of the following Minimum Guideline provisions: " .
17 . . if a critical area designation overlies a natural resource land designation, both
18 designations apply" [WAC 365-190-040(7)(a)] or the further suggestion of WAC 365-190-
19 070(7) that " . . . if both critical area and natural resource land use designations apply to a
20 given parcel or a portion of a parcel, both or all designations must be made." There is limited
21 analysis of the effects of mining in critical areas reflected in the record. The County merely
22 asserts it determined "certain critical areas do not have long-term commercial significance
23 for mineral extraction", " . . . that the lands covered predominately by critical areas are not
24 commercially significant for mineral extraction purposes . . . " and that " . . . certain specified
25 critical areas should not be included in designated Mineral Resource Lands as such areas
26 would never be commercially significant . . . ".⁹⁶
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32 ⁹⁴ Id.

⁹⁵ *Lewis County* at 501

⁹⁶ Thurston County Prehearing Brief at 23, 24, 25

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1 The County's oft repeated statement that its decision in regards critical areas was based on
2 the need to balance the GMA goals is simply insufficient to allow the Board to determine it
3 complied with the requirements of RCW 36.70A.170 and RCW 36.70A.060.
4

5 Alleged violations of RCW 36.70A.100 and RCW 36.70A.131 are both related to the RCW
6 36.70A.170 required designation process:

7 RCW 36.70 A.100: The comprehensive plan of each county or city that is
8 adopted pursuant to RCW 36.70A.040 shall be coordinated with, and consistent
9 with, the comprehensive plans adopted pursuant to RCW 36.70A.040 of other
10 counties or cities with which the county or city has, in part, common borders or
11 related regional issues.

12 RCW 36.70A.131, in relevant part:

13 As part of the review required by RCW 36.70A.130(1), a county or city shall
14 review its mineral resource lands designations adopted pursuant to RCW
15 36.70A.170 and mineral resource lands development regulations adopted
16 pursuant to RCW 36.70A.040 and 36.70A.060. In its review, the county or city
17 shall take into consideration:

18 1) New information made available since the adoption or last review of its
19 designations or development regulations, including data available from the
20 department of natural resources relating to mineral resource deposits;

21 Based on the Board's findings and conclusions presented below in Section F, the Board
22 determines Weyerhaeuser has failed to meet its burden to establish violations of those
23 sections of the GMA in the context of these Issues and they are dismissed.

24 The same allegations, plus violations of RCW 36.70A.170, are included in Issue 10 which
25 asserts the County's failure to "assess the mineral resource availability".⁹⁷ Similarly, based
26 on the Board's findings and conclusions in Section F, the Board determines Weyerhaeuser
27 has failed to meet its burden to establish violations of those sections of the GMA in regards
28 the requirement to assess mineral availability. Issue 10 is dismissed in its entirety.
29
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⁹⁷ Assessment will be expected to occur during the RCW 36.70A.130 comprehensive plan review process.

1 Conclusion

2 In regards Issue 9, the Board finds and concludes Petitioner Weyerhaeuser has carried its
3 burden of proof in demonstrating Thurston County's action in adoption of Resolution No.
4 14401 and Ordinance No. 14402 was a clearly erroneous violation RCW 36.70A.170(2)
5 because the Record fails to demonstrate that the minimum guidelines contained in WAC
6 365-190 were considered.
7

8 In regards Issue 10, based on the Board's findings and conclusions presented below in
9 Section F, the Board concludes that Petitioner Weyerhaeuser has failed to carry its burden
10 of proof in demonstrating Thurston County's action in adoption of Resolution No. 14401 and
11 Ordinance No. 14402 violated RCW 36.70A.170, RCW 36.70A.100, RCW 36.70A.131 and
12 RCW 36.70A.060(1).
13

14 In regards Issue 21, the Board concludes Petitioners Segale and WACA have carried their
15 burden of proof in demonstrating Thurston County's action in adoption of Resolution No.
16 14401 and Ordinance No. 14402 was a clearly erroneous violation of RCW 36.70A.170 as
17 the record fails to demonstrate the minimum guidelines contained in WAC 365-190 were
18 considered.
19
20

21 **D.⁹⁸ Conservation of Mineral Resources/Adjoining Uses: Issues 11, 12 and 13⁹⁹**
22

23 **Issue 11.** Do the Amendments fail to comply with the requirements of RCW 36.70A.020(8)
24 and RCW 36.70A.060 by failing to adopt regulations that conserve and protect mineral
25 resource lands, thus failing to enhance and maintain the mineral resource industry? (Segale
26 3.8; WACA 3.12)

27 **Issue 12.** Do the Amendments fail to comply with the requirements of RCW 36.70A.020(8)
28 and RCW 36.70A.060 by prohibiting mineral resource activity on land not designated as
29 mineral resource land? (Segale 3.9; WACA 3.13)

30
31 ⁹⁸ As a result of further legal analysis occasioned by motions for reconsideration filed by WACA, Segale and
32 Thurston County, this section of the Amended FDO has been rewritten and results in significantly different
conclusions than reached by the Board in its original Final Decision and Order.

⁹⁹ Issue 13 was listed in a separate issue category (Adjoining Uses) in the Prehearing Order. However, it is
inextricably tied to Issues 11 and 12 and will be addressed in this section.

1 **Issue 13.** Do the Amendments fail to comply with the requirements of RCW 36.70A.020(8),
2 RCW 36.70A.050, RCW 36.70A.060, RCW 36.70A.131, and RCW 36.70A.170 by failing to
3 preclude adjacent uses that would interfere with or are incompatible with mineral extraction
4 activities and imposing 1000-foot buffer requirements on mineral resource lands? (WACA
5 3.9)

6 Issues 11 and 12 were raised by both WACA and Segale. Segale briefed both of those
7 issues and WACA incorporated Segale's arguments by reference.

8 WACA's Issue 13 alleges various violations of the GMA yet WACA only argues a violation of
9 RCW 36.70A.060 in its opening brief. Therefore, the Board deems the other cited
10 provisions, RCW 36.70A.050, RCW 36.70A.131, and RCW 36.70A.170, have been
11 abandoned.
12

13
14 Applicable Law

15 RCW 36.70A.060, in relevant part, states:

16
17 (1)(a) . . . each county that is required or chooses to plan under RCW
18 36.70A.040 . . . shall adopt development regulations on or before September 1,
19 1991, to assure the conservation of . . . mineral resource lands designated under
20 RCW 36.70A.170. Regulations adopted under this subsection . . . shall remain in
21 effect until the county . . . adopts development regulations pursuant to RCW
22 36.70A.040. *Such regulations shall assure that the use of lands adjacent to . . .*
23 *mineral resource lands shall not interfere with the continued use, in the*
24 *accustomed manner and in accordance with best management practices, of*
25 *these designated lands for . . . the extraction of minerals.*

26 Positions of the Parties

27 Segale observes RCW 36.70A.060(1)(a) requires the County to adopt development
28 regulations assuring the conservation of designated mineral resource lands (MRL) and
29 those development regulations are required to assure the use of adjacent lands does not
30 interfere with continued use of those lands for extraction.¹⁰⁰
31
32

¹⁰⁰ Segale Opening Brief at 8
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1 It is Segale's position the County's development regulations preclude MRL designation and
2 use in areas where the mineral resource use itself would conflict with other adjacent uses.¹⁰¹

3 Segale provides the following by way of example:

4 1. Mining may only occur on designated MRL while neither forestry nor
5 agriculture are prohibited on non-designated resource lands;

6 2. To qualify for MRL designation at least 60 percent of the area within 1000 feet
7 must have parcels of 5 acres or larger, excluding parcels owned by the applicant;

8 3. Designation of MRL is contingent upon issuance of a DNR reclamation permit
9 but such permits are not issued for sites not designated MRL-a catch 22.¹⁰²

10
11 WACA states it is impossible to protect MRL from incompatible uses where, as here, the
12 County has failed to determine where the MRL are located.¹⁰³ It argues the County first
13 needed to locate MRL and to then designate them. It further argues that once identified, it is
14 incumbent upon the County to protect those lands from conflicting uses. WACA argues the
15 County has “. . . no regulations to prevent incompatible uses from being established on, or
16 adjacent to, mineral resource deposits.”¹⁰⁴ Rather, WACA and Segale both state the County
17 scheme seeks to protect other uses from the impacts of mineral extraction activity
18 referencing, among other uses and features, critical areas, geologic features, agricultural
19 lands and residential uses.
20
21

22 WACA expands on its argument in regards Issue 13 by asserting County Comprehensive
23 Plan Policies 2¹⁰⁵ and 6¹⁰⁶ reference protection of MRL from adjacent uses but that the
24
25

26
27 ¹⁰¹ Id. at 9

28 ¹⁰² Id. at 9, 10. The County acknowledged this defect in its criterion for designation and, at footnote 1, pg. 2 of
its Prehearing Brief and at the Hearing on the Merits, agreed to rectify it.

29 ¹⁰³ WACA Reply Brief at 3.

30 ¹⁰⁴ Id. at 4.

31 ¹⁰⁵ Policy 2: Designated mineral resource lands of long-term commercial significance should be conserved for
mineral extraction, and the use of adjacent lands should not interfere with the continued use of the designated
mining sites that are being operated in accordance with applicable best management practices and other laws
and regulations.

32 ¹⁰⁶ Policy 6: New residential uses shall be discouraged from locating near prime designated mineral deposit
sites until mineral extraction is completed unless adequate buffering is provided by the residential developer.

1 County has no regulations implementing those policies.¹⁰⁷ WACA opines the County has no
2 limits on land use adjacent to MRL.¹⁰⁸ Additionally, it argues the County takes a position
3 directly contrary to MRL protection, citing Comprehensive Plan Policies 7¹⁰⁹ in 9¹¹⁰, which
4 address protection of adjacent uses from mining activity.¹¹¹
5

6 The County responds that the amendment requiring that at least 60 percent of the area
7 within 1000 feet of a proposed mining site must have parcels of five acres or larger,
8 excluding parcels owned by the applicant, serves to protect sites ultimately designated from
9 adjoining, incompatible uses.¹¹² Its position is more conflict would result if there was greater
10 residential density, taking into account WAC 365-190-070's requirement to consider land
11 use patterns.¹¹³ The County also cites the amendments that designated sites must be at
12 least 1000 feet from Urban Growth Areas as well as from public parks and preserved as
13 requirements designed to reduce conflict.¹¹⁴ The County repeats a mantra used throughout
14 its brief: that it was only following the GMA mandate to balance the often conflicting goals of
15 the GMA when it adopted its designation criteria.¹¹⁵
16
17

18 The County also observes its process leading to adoption of the Resolution and Ordinance
19 was not intended to, and did not, involve designation of MRL. Rather its efforts focused on
20 the designation criteria to be applied during its next RCW 36.70A.130 update, required to be
21 completed by December 1, 2014.¹¹⁶
22

23 Board Analysis and Findings

24

25
26 ¹⁰⁷ WACA's Opening Brief at 16.

27 ¹⁰⁸ Id. at 17.

28 ¹⁰⁹ Policy 7: Extraction industries shall not adversely impact adjacent or nearby land uses, or public health and
29 safety.

30 ¹¹⁰ Policy 9: Areas where existing residential uses at densities of greater than 1 unit per five acres predominate
31 shall be protected against intrusion by mineral extraction operations.

32 ¹¹¹ Id. at 17

¹¹² Thurston County Prehearing Brief at 30, 31

¹¹³ Id. at 31

¹¹⁴ Id. at 32

¹¹⁵ Id. at 34

¹¹⁶ Id at 1

1 The sole remaining violation allegations following dismissal of many of the alleged statutory
2 violations are RCW 36.70A.060(1)(a)'s mandates to: (1) assure the conservation of
3 designated MRL, and (2) assure the use of lands adjacent to MRL do not interfere with the
4 continued use of those lands for the extraction of minerals.
5

6 The Board notes RCW 36.70A.060(1)(a) sets forth the initial requirement for jurisdictions to
7 adopt development regulations **to assure the conservation** of their MRL first designated
8 pursuant to RCW 36.70A.170, a task which in this instance the County was to have
9 completed by September 1, 1991. The RCW 36.70A.060(1)(a) directive also required
10 compliance by September 1, 1991.
11

12 However, these development regulations **to assure the conservation** of MRL were only to
13 remain in effect until the County adopted development regulations pursuant to RCW
14 36.70A.040 as .060(1)(a) clearly states: [Emphasis added]
15

16 Regulations adopted under this subsection ...*shall remain in effect until the*
17 *county or city adopts development regulations pursuant to RCW 36.70A.040.*
18

19 Therefore, any claim based on RCW 36.70A.060 alleging a failure to adopt regulations
20 designed **to assure the conservation** would more appropriately be based on RCW
21 36.70A.040, not RCW 36.70A.060. However, the need to assure that adjacent uses do not
22 interfere with the continued use of MRL is a separate question.
23

24 RCW 36.70A.060 provides:
25

26 ***Such regulations shall assure that the use of lands adjacent to . . . mineral***
27 ***resource lands shall not interfere with the continued use, in the accustomed***
28 ***manner and in accordance with best management practices, of these designated***
29 ***lands for . . . the extraction of minerals.***

30 The Board interprets the highlighted words "such regulations" as referring to the regulations
31 required to be adopted pursuant to RCW 36.70A.040; that is, the RCW 36.70A.040
32 regulations must assure adjacent uses do not interfere with the continued use of MRL.

1 Consequently, claims alleging a failure to assure that adjacent uses do not interfere with the
2 continued use of MRL are properly raised under RCW 36.70A.060(1) as it is the provision of
3 the GMA which imposes the requirement.
4

5 The question thus placed before the Board is whether WACA and Segale have met their
6 burden of proof to establish a violation of RCW 36.70A.060(1)(a)'s requirement to assure
7 adjacent land uses do not interfere with the continued use of designated MRL.
8

9 Issue 11 alleges a violation of RCW 36.70A.060 due to a failure to adopt development
10 regulations to conserve and protect MRL while Issue 12 alleges the same statutory violation
11 results from the County prohibition of mineral resource activity on land not so designated.
12 First of all, as to Petitioners' arguments regarding the alleged failure of the County to locate
13 and then designate MRL, the County prohibition of mineral resource activity on non-
14 designated land, or the fact MRL designation is contingent on issuance of a DNR
15 reclamation permit are not violations encompassed by RCW 36.70A.060. A failure "to adopt
16 regulations that conserve and protect mineral resource lands" as alleged in Issue 11 is more
17 properly a claim raised as a violation of RCW 36.70A.040.¹¹⁷ Neither is the Issue 12
18 allegation appropriately raised under RCW 36.70A.060. In this context, the only cognizable
19 allegation would involve the County's failure to assure adjacent uses do not interfere with
20 continuation of a mineral resource activity. Neither Issue 11 nor Issue 12 raise such a claim.
21 Consequently, Petitioners are unable to establish violations of RCW 36.70A.060.
22
23
24

25 Issue 13, on the other hand, clearly addresses the failure to adopt regulations to preclude
26 interference of mineral resource activity resulting from adjacent lands.
27

28 Segale and WACA stress the GMA's critical imperative to protect natural resource lands
29 from incompatible land uses. They argue the County has Comprehensive Plan policies
30

31
32 ¹¹⁷ Although WACA and Segale's Issue 11 uses the phrase "conserve and protect" in regards an alleged RCW
36.70A.060 violation, it should be clarified that RCW 36.70A.060(1)(a) uses the phrase "assure the
conservation" of MRL (and other natural resource lands).

1 regarding such protections but state the County has no implementing development
2 regulations. However, their argument that there are no regulations implementing
3 Comprehensive Plan Policies 2 and 6 is misplaced. The failure to adopt development
4 regulations implementing a comprehensive plan are claims grounded in RCW 36.70A.040,
5 and are not encompassed by RCW 36.70A.060.¹¹⁸
6

7 The County's counter-argument which points out various provisions of the amendments
8 which serve to prevent interference with the continued use of MRL also misses the mark.
9 On the other hand, the County's position that the Resolution and Ordinance only addressed
10 its designation criteria and designation process is convincing. It states it took no action to
11 amend its regulations addressing protection of natural resource lands and that it is next
12 scheduled to undertake that task with its upcoming RCW 36.70A.130/RCW 36.70A.131
13 review.
14

15
16 The Resolution and Ordinance did not involve development regulations designed to
17 conserve MRL, although some of the designation criteria may in fact serve that purpose.
18 Unamended portions of the comprehensive plan and development regulations are not
19 subject to challenge. In this instance, the County's development regulations conserving
20 MRL were not amended, are not now subject to challenge, and need not be reviewed until
21 the County's next RCW 36.70A.130 review pursuant to RCW 36.70A.131.¹¹⁹
22

23 Conclusion

24
25 In regards Issues 11 and 12, the Board concludes Petitioners Segale and WACA have
26 failed to carry their burden of proof in demonstrating Thurston County's action in adoption of
27

28
29
30 ¹¹⁸ RCW 36.70A.040(3)(d) provides, in relevant part: *...county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan ...*

31 ¹¹⁹ The Board observes that TCC Chapter 20.35B contains few, if any, regulations assuring mineral resource
32 lands are protected from incompatible uses. While TCC Chapter 18.04 does include resource lands notification requirements, those alone are far from sufficient to meet the requirements of RCW 36.70A.060. If such protections are not set forth in other chapters of the TCC, the County would be well advised to consider steps to assure the necessary protection.

1 Resolution No. 14401 and Ordinance No. 14402 was a clearly erroneous violation of RCW
2 36.70A.060.

3
4 In regards Issue 13, the Board concludes WACA has failed to carry its burden of proof in
5 demonstrating Thurston County's action in adoption of Resolution No. 14401 and Ordinance
6 No. 14402 violated RCW 36.70A.060.

7
8 **E. Consideration of New Information: Issue 14**

9 **Issue 14.** Do the Amendments fail to comply with the requirements of RCW 36.70A.131 by
10 not taking into consideration new information available, including information available from
11 the Department of Natural Resources and property owners, regarding mineral resource
12 lands? (Segale 3.6; WACA 3.10)

13 This issue was raised by Segale and WACA, briefed by Segale, and WACA incorporated
14 that argument by reference.

15
16 *Positions of the Parties*

17 The gist of Segale's argument is that RCW 36.70A.131 requires the County to consider
18 available new information; the Minimum Guidelines direct the County to use available maps
19 and information on location and extent of mineral deposits; that such information was
20 provided to the County or available to it, and; the County failed to consider the
21 information.¹²⁰ It states the County fails to deny the assertion that it had information
22 regarding the location of mineral resources within the County and, in addition, the County
23 had ready access to additional information.¹²¹

24
25
26 The County's position is that it need not have considered information regarding the location
27 of mineral resources as its efforts in developing and adopting the Resolution and Ordinance
28 did not involve its required RCW 36.70A.130 comprehensive plan review.
29
30
31
32

¹²⁰ Segale Properties LLC's Opening Brief at 10-13.

¹²¹ Segale Properties LLC's Reply Brief at 7.

1 Board Analysis and Findings

2 RCW 36.70A.131 specifically states:

3 **As part of the review required by RCW 36.70A.130(1), a county . . . shall**
4 **review its mineral resource lands designations In its review, the**
5 **county . . . shall take into consideration:**

6 (1) **New information** made available since the adoption or last review of its
7 designations or development regulations, including data available from the
8 department of natural resources relating to mineral resource deposits;

9
10 The Board concurs with the County's position. RCW 36.70A.131 requires jurisdictions to
11 consider new information during its RCW 36.70A.130 review. As more fully discussed in the
12 following section, the County's actions did not involve that review. Segale and WACA are
13 unable to establish a violation of RCW 36.70A.131.

14
15 Conclusion

16 The Board concludes that Petitioners Segale and WACA have failed to carry their burden
17 of proof in demonstrating Thurston County's action in adoption of Resolution No. 14401 and
18 Ordinance No. 14402 violated RCW 36.70A.131.

19
20 **F. Designation of Mineral Resources: Issues 15 and 17**

21 **Issue 15.** Do the Amendments fail to comply with the requirements of RCW 36.70A.070
22 and RCW 36.70A.170 by failing to apply the County's adopted mineral resource lands
23 designation criteria to designate mineral resource lands and include such designations on
24 the future land use map? (Segale 3.3; WACA 3.5)

25 **Issue 17.** Do the Amendments fail to comply with the requirements of RCW 36.70A.020(8)
26 and RCW 36.70A.170 by failing to designate, and prohibiting the designation of, known
27 mineral resource deposits as mineral resource lands? (Segale 3.5; WACA 3.7)

28 WACA briefed both issues, Segale briefed Issue 17 and incorporated WACA's argument by
29 reference. In its briefing WACA makes no reference to any possible violation of RCW
30 36.70A.070 and the Board concludes that portion of Issue 15 has been abandoned by
31 WACA and Segale.
32

1 Applicable Law

2 The relevant portion of RCW 36.70A.170 provides:

3 (1) . . . each county . . . shall designate where appropriate:

4 (c) Mineral resource lands that are not already characterized by urban growth
5 and that have long-term significance for the extraction of minerals;
6

7 Positions of the Parties

8 In support of Issue 15, WACA observes the GMA and its underlying regulations require
9 jurisdictions to not only adopt designation criteria but to then also designate MRL and
10 identify those lands on a future land-use map. It asserts "designation" means to establish
11 the distribution, location and extent of such lands. It opines the County made no effort to
12 comply but rather relied on prior inaccurate mapping in violation of the GMA and Board
13 precedent.¹²² An additional assertion is that the lands designated on County maps are
14 unrelated to its designation criteria and fail to satisfy them.¹²³
15

16
17 As to Issue 17, it is WACA's position the County failed to designate MRL but rather focused
18 on where to prohibit designation by adopting exclusionary criteria.¹²⁴ WACA argues the
19 County's designation criteria are in fact a series of maps depicting where MRL designation
20 will not be allowed.¹²⁵ It states such an approach fails to comply with RCW 36.70A.170's
21 direction to designate MRL, a position echoed by Segale.
22

23 The County again states it was not required to actually designate additional MRL. Rather, it
24 was only amending the MRL designation criteria; review of its actual MRL designations will
25 occur during the upcoming RCW 36.70A.130 review.
26
27
28
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30

31 ¹²² WACA's Opening Brief at 12, 13

32 ¹²³ Id. at 14

¹²⁴ Id. at 2, 3

¹²⁵ Id. at 8

1 Board Analysis and Findings

2 As the County points out, the Resolution and Ordinance were adopted as part of its annual
3 update and involved, among other things, revisions to its MRL designation criteria. Rather
4 than revise its designation criteria and then actually designate MRL, the County chose to
5 divide those tasks and states it plans to apply the designation criteria during its next RCW
6 36.70A.130 Comprehensive Plan review.
7

8 For the same reasons the Board determined the County was not required to consider new
9 information, the Board agrees the County was not required to "review its mineral resource
10 lands designations" under RCW 36.70A.131 as that requirement specifically states:
11

12 **As part of the review required by RCW 36.70A.130(1), a county or city shall**
13 **review its mineral resource lands designations adopted pursuant to RCW**
14 **36.70A.170 and mineral resource lands development regulations adopted**
15 **pursuant to RCW 36.70A.040 and 36.70A.060.**

16 Furthermore, RCW 36.70A.130(1)(a) provides specific schedules pursuant to which
17 jurisdictions are required to review and revise comprehensive plans and development
18 regulations:

19 Each comprehensive land use plan and development regulations shall be subject
20 to continuing review and evaluation by the county or city that adopted them.
21 Except as otherwise provided, **a county or city shall take legislative action to**
22 **review and, if needed, revise its comprehensive land use plan and**
23 **development regulations to ensure the plan and regulations comply with**
24 **the requirements of this chapter according to the deadlines in subsections**
25 **(4) and (5) of this section.**

26 The County asserts its next required RCW 36.70A.130 review is scheduled for completion
27 by the end of 2014. Thus, the failure to designate MRL, the prohibition of designation of
28 MRL (Issue 17), the failure to apply the MRL designation criteria and amend the future land
29 use map (FLUM) (Issue 15) are premature challenges. Those allegations would be
30 appropriate following the County's completion of its comprehensive plan update. Application
31 of the criteria to actually designate MRL and reflection of those designations on the FLUM
32 will be subject to challenge then. Concerns regarding "exclusionary" criteria will hopefully be

1 addressed during that process through appropriate consideration of the Minimum
2 Guidelines.

3
4 Conclusion

5 The Board concludes Petitioners Segale and WACA have failed to carry their burden of
6 proof in demonstrating Thurston County's action in adoption of Resolution No. 14401 and
7 Ordinance No. 14402 violated RCW 36.70A.070, RCW 36.70A.170 or RCW 36.70A.131 in
8 regards Issues 15 and 17.
9

10 **G. Designation of Mineral Resources: Issues 16, 18, 19 and 20**

11 **Issue 16.** Do the Amendments fail to comply with the requirements of RCW 36.70A.020(8)
12 and RCW 36.70A.170 by adopting mineral resource lands designation criteria that rely
13 solely on landowner intent and property owner initiated parcel-by-parcel comprehensive
14 plan future land use map amendments, thus failing to enhance and maintain the mineral
15 resource industry? (Segale 3.4; WACA 3.6 Weyerhaeuser pgrph. D,E,F,G,H)

16 **Issue 18.** Do the Amendments fail to comply with the requirements of RCW 36.70A.020(8),
17 RCW 36.70A.050, RCW 36.70A.060, RCW 36.70A.131, and RCW 36.70A.170 by
18 prohibiting the co-designation of mineral resource lands and forest resource lands? (WACA
19 3.8)

20 **Issue 19.** Do the Amendments fail to comply with the requirements of RCW 36.70A.020(6),
21 RCW 36.70A.020(8), RCW 36.70A.060 and RCW 36.70A.170 by making designation of
22 mineral resource lands contingent upon issuance of a reclamation permit from the
23 Washington State Department of Natural Resources? (Segale 3.7; WACA 3.11)

24 **Issue 20.** Do the Amendments fail to comply with the requirements of RCW 36.70A.020(8),
25 RCW 36.70A.020(6) and RCW 36.70A.170 by adopting arbitrary and discriminatory
26 designation criteria and regulations that prohibit the expansion of existing mineral resource
27 production operations and that exclude land on which extraction occurs or can be
28 anticipated and lands located adjacent to other designated mineral lands from mineral
resource lands designation ? (Segale 3.11; WACA 3.15)

29 Although Segale provided no argument in support of Issues 16 and 19, it did incorporate the
30 argument of both WACA and Weyerhaeuser in regards Issue 16 and the argument of WACA
31 in regards Issue 19. While Weyerhaeuser makes reference to Issue 16 in its Prehearing
32

1 Brief, specific argument addressing the “landowner intent” argument was lacking.

2 Consequently, Weyerhaeuser is deemed to have abandoned that issue.

3
4 WACA failed to address RCW 36.70A.131 in its argument under Issue 18. That allegation
5 will be dismissed.

6
7 Positions of the Parties

8 Issue 16

9 WACA argues designation of MRL in the County requires a landowner's application, thus
10 basing preservation of MRL on landowner intent in violation of RCW 36.70A.170. WACA
11 cites *City of Redmond v. CPSGMHB*¹²⁶ to the effect that reliance on landowner intent for
12 designation of natural resource lands violates the GMA conservation requirements.¹²⁷ In
13 addition, WACA observes that reliance on landowner intent could also lead to preclusion of
14 MRL designation due to the possibility that incompatible adjacent uses might be permitted
15 prior to designation application.

16
17
18 The County denies it is relying solely on landowner intent for designation of MRL. It states
19 the County plans to review its mineral resource land designations in 2014. Additionally, it
20 takes the position application for designation has always been allowed by the County.¹²⁸

21
22 Issue 18

23 This Issue raises the same concerns addressed in earlier issues, primarily in Issue 9: the
24 prohibition of dual designation of natural resource lands. WACA states the Minimum
25 Guidelines require the County to co-designate forest and mineral resource lands where both
26 are present. Rather than comply, WACA argues the County prohibited dual designation
27 contrary to the recommendations of its Mineral Lands Task Force, staff and Planning
28
29
30
31

32 ¹²⁶ 136 Wn2d 38 (1998)

¹²⁷ WACA's Opening Brief at 14

¹²⁸ Thurston County's Prehearing Brief at 17

Commission in violation of RCW 36.70A.050, RCW 36.70A.060 and RCW 36.70A.170.¹²⁹ It asserts the record fails to support the County's decision.¹³⁰

That decision, according to WACA, is a prioritization of forestry resource lands, contrary to WAC 365-190-040(7)(b) which directs jurisdictions to assess which of those two natural resource uses has the greatest long-term commercial significance only when the two are determined to be incompatible. The record, WACA asserts, evidences compatibility and, further, that the County's findings reach the same conclusion.¹³¹

As set forth above, the County argues its decision was within its discretion.¹³² The County states preclusion of dual designation is supported by the record and complies with WAC 365-195-040(7)(b) of the Minimum Guidelines.

Issue 19

This Issue is narrow in scope and raises one of the same contentions Segale addressed in regards to Issue 11: Ordinance No. 14402 provides that designation of MRL is contingent upon issuance of a DNR reclamation permit but such permits are not issued for sites not designated MRL. The Board addressed this Issue previously, finding the County acknowledged the problem and committed to resolving it.¹³³

Issue 20

Issue 20 alleges the County adopted designation criteria which prohibit expansion of existing operations and exclude land from designation where operations currently exist or on appropriate adjacent lands. Both Segale and WACA present limited briefing on this issue although it raises concerns referenced in other issues. They do allege many of the requirements are unsupported by the record, including: 1000 ft. buffers, excluding parcels

¹²⁹ Id. at 9

¹³⁰ Id. at 10

¹³¹ Id.

¹³² The County's position on dual designation is set forth in full in the discussion of Issue 9.

¹³³ See footnote 100 above

1 owned by the applicant, allowing uses other than mining to impact Mima Mounds but not
2 mining itself. However, the Petitioners fail to relate their arguments to the prohibition of
3 designation of existing operations or expansion.
4

5 It is also difficult to parse the County's response to the Petitioners' Issue 20 allegations.
6

7 Board Analysis and Findings

8 Issue 16

9 The Board agrees with the County in regards to Issue 16. A review of mineral resource land
10 designation is anticipated to occur in Thurston County in 2014. The language of the
11 Resolution and Ordinance does not establish that the County designation criteria, or
12 eventual designation process, will "rely solely on landowner intent and property owner
13 initiated parcel-by-parcel" FLUM amendments as the Petitioners assert.
14

15 Issue 18

16 The allegations involving RCW 36.70A.050 and RCW 36.70A.170 in this issue (the
17 prohibition of dual designation of MRL and forest lands) were previously and thoroughly
18 addressed in relation to the Issue 8 and 9 challenges. Here again, the Board finds the
19 record is inadequate to determine whether or not the County's decision to depart from the
20 Minimum Guidelines in precluding dual designation of MRL and Forest Lands considered
21 permissible criteria "not explicitly tied to the WAC factors"¹³⁴ or whether the County actually
22 considered the Minimum Guidelines. The Board concludes WACA has carried its burden of
23 proof in establishing the County violated RCW 36.70A.170. In the context of this issue, the
24 Board concludes RCW 36.70A.060, the requirement to adopt regulations assuring the
25 conservation of designated MRL, is inapplicable.
26
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¹³⁴ *Lewis County*
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1 Issue 19

2 The County has conceded the Ordinance requirement making designation of MRL
3 contingent upon issuance of a reclamation permit from DNR was in error. Consequently, the
4 Petitioners have established a violation of RCW 36.70A.060.¹³⁵ RCW 36.70A.170, the
5 statute requiring designation, is inapplicable to this issue.
6

7 Issue 20

8 While failing to designate lands on which mining operations currently exist and preclusion of
9 expansion of existing operations on appropriate lands are valid concerns, the Board
10 concludes the lack of adequate briefing and argument on this issue, necessitate the
11 conclusion that Segale and WACA have failed to meet their burden of proof.
12

13 Conclusion

14
15 In regards Issue 16, the Board concludes the Petitioners failed to carry their burden of proof
16 in demonstrating Thurston County's action in adoption of Resolution No. 14401 and
17 Ordinance No. 14402 violated RCW 36.70A.170.
18

19 In regards Issue 18, the Board concludes WACA has carried its burden of proof in
20 demonstrating Thurston County's action in adoption of Resolution No. 14401 and Ordinance
21 No. 14402 was a clearly erroneous violation RCW 36.70A.170(2) because the Record fails
22 to demonstrate that the minimum guidelines contained in WAC 365-190 were considered.
23

24 In regards Issue 19, in light of the County's agreement that an error was made and its
25 stipulation to correct it, the Board concludes WACA and Segale have carried their burden of
26 proof in demonstrating Thurston County's action in adoption of Ordinance No. 14402 was a
27

28
29 ¹³⁵ The Board previously concluded the fact MRL designation is contingent on issuance of a DNR reclamation
30 permit is not a violation encompassed by RCW 36.70A.060. However, the County stipulated it would remove
31 this requirement at pg. 2 of its Prehearing Brief: "(Issue 19) The County does agree that an error was made
32 regarding the criterion requiring the issuance of a reclamation permit prior to designation. This language was
not new, but was already part of the criteria and was previously limited by Thurston County Code ("TCC")
20.30B.035. Index 52 (pg. 52). That limiting section was amended which made the criterion unworkable. Index
52 (pg. 53). The County stipulates that it will remove that provision in both the Comprehensive Plan and
Development Regulations."

1 clearly erroneous violation of RCW 36.70A.060 due to the inclusion of the requirement for a
2 property owner to obtain a reclamation permit from the Washington State Department of
3 Natural Resources prior to designation.

4
5 In regards Issue 20, the Board concludes Segale and WACA have failed to carry their
6 burden of proof in demonstrating Thurston County's action in adoption of Resolution No.
7 14401 and Ordinance No. 14402 violated RCW 36.70A.170.

9 **H. Critical Areas: Issue 22**

10 **Issue 22.** Do the Amendments fail to comply with the requirements of RCW 36.70A.060
11 and RCW 36.70A.172 because they amount to a de facto and erroneous amendment of the
12 County's critical areas regulations by including exclusionary criteria based on the presence
13 of critical areas without regard to best available science? (Segale 3.16)

14 Applicable Law

15
16 RCW 36.70A.172, in relevant part, provides as follows:

17 (1) In designating and protecting critical areas under this chapter, counties . . .
18 shall include the best available science in developing policies and development
19 regulations to protect the functions and values of critical areas

20 Positions of the Parties

21 Segale asserts the Resolution and Ordinance result in a *de facto* amendment of the
22 County's critical areas ordinance as they provide new restrictions on lands containing critical
23 areas. That fact, Segale observes, incorporates the GMA requirement to apply best
24 available science (BAS) in adopting critical area regulations.¹³⁶ By way of support for that
25 argument, Segale quotes Finding 18 from the Resolution: "The current designation criteria
26 used for mineral lands LTCS does not include extensive environmental factors or location
27 criteria, thereby potentially negatively impacting critical areas and other environmentally
28 sensitive areas." Segale states the County acknowledged it did not base its restrictions on
29 BAS.¹³⁷
30
31
32

¹³⁶ Id. at 18

¹³⁷ Id. at 19

1 The County again argues the decision to not allow designation of MRL in many critical areas
2 was based on the requirement to balance the GMA goals, referencing many of those goals
3 and how its decisions were in keeping with them.¹³⁸ It cites numerous portions of the record
4 where the interplay of the Critical Areas Ordinance and MRL activity was discussed.¹³⁹ The
5 County also states the Resolution and Ordinance do not constitute *de facto* amendments of
6 its CAO as they do not affect how critical areas are regulated, citing this Board's decision in
7 *Storedahl*¹⁴⁰ as support. Rather, the County states it:

9 "determined that lands covered predominately by critical areas are not
10 commercially significant for extraction purposes due to the fact that mining
11 activities are limited or prohibited in these areas by the CAO. Further, the County
12 determined that certain specified critical areas should not be included in
13 designated mineral resource lands as such areas **would never be**
14 **commercially significant** and to add further protection to the environment.
15 Neither of these actions change how critical areas are regulated under the
16 County's critical areas ordinance."¹⁴¹ (bold in the original)

16 In response to the County's argument, Segale points to limitations which are included in the
17 amendments which are not found in the County's CAO and states that since the
18 amendments change how critical areas are regulated they do in fact constitute *de facto*
19 amendments of the CAO, thus requiring the application of BAS:

- 21 1. The CAO allows mineral extraction in all CARAs while the amendments do
22 not allow it in CARA I.
- 23 2. The CAO allows mineral extraction in 100 year floodplains while the
24 amendments do not.
- 25 3. The CAO allows extraction in geologically sensitive areas while the
26 amendments do not.
- 27 4. The CAO allows extraction in all critical habitat areas while the
28 amendments do not.¹⁴²

29 ¹³⁸ Thurston County's Prehearing Brief at 27, 28

30 ¹³⁹ Id. at 28

31 ¹⁴⁰ Case No. 96-2-0016c, Order Re: Motion for Reconsideration, 9/15/97. A decision in which the County
32 suggests the Board rejected a similar "de facto critical areas amendment" argument as Clark County's policy
regarding mineral extraction did not change how its SMP was applied.

¹⁴¹ Thurston County's Prehearing Brief at 24, 25

¹⁴² Segale's Reply Brief at 9, 10. See also TCC 17.15, Table 5 Uses in Critical Areas – Mineral Extraction. The
Board takes official notice of the Thurston County Code pursuant to WAC 242-02-660.

1 Board Analysis and Findings

2 Issue 22 raises the following question: whether the County's decision to deny potential MRL
3 designation to certain specified critical areas fails to comply with the RCW 36.70A.172
4 requirement to apply best available science (BAS) when "protecting critical areas under [the
5 GMA]". The County's position is the Resolution and Ordinance do not affect how critical
6 areas are regulated.¹⁴³ However, the Board cannot agree with that contention. The
7 Resolution and Ordinance do affect critical areas regulation. While the County is correct that
8 its Critical Areas Ordinance would still apply to designated MRL, the effect of those
9 amendments is to add another "screen" to "sift out" potential lands from designation. As the
10 County itself stated, it did so to "add further protection to the environment".¹⁴⁴ That
11 observation is also supported by Resolution Finding 8¹⁴⁵ and Ordinance Finding 10¹⁴⁶:

12
13 The current designation criteria used for mineral lands LTCS does not include
14 extensive environmental factors or location criteria, thereby potentially negatively
15 impacting critical areas and other environmentally sensitive areas.

16 RCW 36.70A.172 mandates the application of BAS when "protecting critical areas". The
17 County did not dispute the allegation of a failure to apply BAS, asserting it was not
18 amending its Critical Areas Ordinance.¹⁴⁷ It based its response on the difficult task of
19 balancing the goals of the GMA and the unsubstantiated (in the record) claims that lands
20 encumbered by the specified critical areas would never be commercially significant.
21
22

23 Conclusion

24 In regards Issues 22, the Board concludes Segale has carried its burden in demonstrating
25 Thurston County's action in adoption of Resolution No. 14401 and Ordinance No. 14402
26
27
28

29 _____
30 ¹⁴³ Thurston County's Prehearing Brief at 24

31 ¹⁴⁴ Id. at 25

32 ¹⁴⁵ Exhibit 51, page 5

¹⁴⁶ Exhibit 52, page 5

¹⁴⁷ The Board does not believe that all regulations protecting critical areas must be included within the Critical Areas ordinance. However, development regulations affecting critical areas would appear to be more appropriate for inclusion in a critical areas ordinance.

1 was a clearly erroneous violation of RCW 36.70A.172 due to the County's failure to include
2 best available science in adopting development regulations protecting critical areas.

3
4 **I. GMA Goals: Issues 1, 3, 12, 13, 16, 17, 18, 19, 20, 21, and 23**

5 The Issues referenced above all include alleged "violations"¹⁴⁸ of goals, specifically the
6 goals set forth related to Housing (RCW 36.70A.020(4)), Economic Development (RCW
7 36.70A.020(5)), Property Rights (RCW 36.70A.020(6)), Natural Resource Industries (RCW
8 36.70A.020(8)), and Public Participation (RCW 36.70A.020(11)). RCW 36.70A.020 is clear
9 that the development of comprehensive plans and development regulations of local
10 government are to be *guided by* the goals as its preamble includes the following: [Emphasis
11 added]
12

13 The following goals are *adopted to **guide** the development and adoption of*
14 *comprehensive plans and development regulations . . .* The following goals are
15 not listed in order of priority and shall be *used exclusively for the purpose of*
16 ***guiding** the development of comprehensive plans and development regulations.*

17 Previous Board decisions have noted jurisdictions are required to consider the GMA's goals
18 so as to guide the development of comprehensive plans and related development
19 regulations although nothing in the GMA requires a specific written delineation of such
20 consideration.¹⁴⁹ Board decisions have also stated that to evaluate whether a planning
21 decision was guided by the goals, the Board considers compliance with a GMA requirement
22 supported by the goals.
23

24 The courts have also recognized the nature of GMA goals, having repeatedly stated they
25 "merely offer guidance".¹⁵⁰ Furthermore, the guiding nature of the goals has been articulated
26 by the courts when comparing the GMA's mandatory requirements to the goals: "Where
27
28
29
30

31 ¹⁴⁸ Petitioners allege in the referenced issues that the County either "fail[ed] to comply", was "not in
32 compliance with", or that the County "violat[ed] the goals" when adopting the Resolution and Ordinance.

¹⁴⁹ *Petree, et al v. Whatcom County*, WWGMHB Case 08-2-0021c, FDO at 39 (Oct. 13, 2008)

¹⁵⁰ *Lewis County*, 157 Wn. 2d 488, 504; See also *Quadrant*: "RCW 36.70A.020 provides general guidelines
and goals."

1 there is a conflict between requirements of the GMA and the goals, the requirements
2 control."¹⁵¹

3
4 Therefore, the question before the Board is whether or not the Record discloses the County
5 was guided by the referenced goals in the process of adopting the Resolution and
6 Ordinance.

7 8 **Goal 4 Housing and Goal 5 Economic Development**

9 These goals were raised in WACA Issue 2:

10 Do the Amendments fail to comply with the requirements of **RCW**
11 **36.70A.020(4), (5)** and RCW 36.70A.070(2), (7) by adopting designation
12 criteria that fail to encourage the availability of affordable housing to all
13 economic segments of the population and that fail to encourage economic
14 development and the expansion of existing businesses? (WACA 3.2)

15 RCW 36.70A.020(4) provides:

16 Housing. Encourage the availability of affordable housing to all economic
17 segments of the population of this state, promote a variety of residential
18 densities and housing types, and encourage preservation of existing housing
19 stock.

20
21 RCW 36.70A.020(5) provides:

22 Economic development. Encourage economic development throughout the
23 state that is consistent with adopted comprehensive plans, promote economic
24 opportunity for all citizens of this state, especially for unemployed and for
25 disadvantaged persons, promote the retention and expansion of existing
26 businesses and recruitment of new businesses, recognize regional differences
27 impacting economic development opportunities, and encourage growth in
28 areas experiencing insufficient economic growth, all within the capacities of
the state's natural resources, public services, and public facilities.

29 WACA's argument is to the effect that the County's adopted designation criteria, by
30 designating lands in remote rural areas, defeats these two goals because of greater
31 transportation costs that would be incurred, costs which would be passed on to the
32

¹⁵¹ *Lewis County*, 157 Wn. 2d 488, 504.
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1 consumer and or taxpayer so as to increase the costs of such things as housing, roadways,
2 and commercial structures.¹⁵² The Board does not dispute that an increase in material
3 costs generally equates to an increase in the overall costs of development. The exhibit
4 cited by WACA states that a 25-mile increase in the length of haul would add approximately
5 \$2000 to the price of an average home,¹⁵³ but WACA does not provide argument as to how
6 this would adversely impact the affordability of the housing market in Thurston County;
7 specifically in relationship to the location of existing mines within the County. Similarly,
8 WACA fails to establish how an increase in transportation costs¹⁵⁴ would negatively impact
9 economic development. Regardless, the impact on cost was before the County during the
10 decision-making process, not only because the exhibits relied on by WACA were provided
11 to the County, but also given the County's expressed consideration of protecting its mineral
12 resources for use by County residents and to promote market stability and profitability.¹⁵⁵
13

14
15 Therefore, the Board finds the County's actions were guided by Goals 4 and 5.
16

17 **Goal 6 Property Rights**

18 Segale and WACA raise a violation of RCW 36.70A.020(6), the GMA's Property Rights goal,
19 in Issues 19 and 20. The text of these issues is set forth in the context of the Board's
20 discussion regarding the requirements for designating mineral lands. However, while
21 WACA briefed both Issue 19 and 20 on designation criteria (Segale having briefed Issue 19
22 and having incorporated WACA's argument by reference), the Board finds no reference to
23 Goal 6 in that argument; thus it has been abandoned.
24

25
26 Weyerhaeuser's Issue 23 also raised a Goal 6 violation:
27
28

29 ¹⁵² WACA Opening Brief, at 6 (Citing Index 9 and Index 157)

30 ¹⁵³ Index 157 at 6

31 ¹⁵⁴ Exhibit 157 states that transportation costs are primarily a function of weight and distance but also relate to
loading and transport difficulty.

32 ¹⁵⁵ Index 17, Feb. 18, 2009 Planning Commission Meeting Minutes at 5(noting a comment letter from Segale
that speaks to increased costs); Index 21 Mineral Lands Task Force, Final Report at 6 (Recommendation B-5
provides pros/cons of capping resource, including profitability, market stability, and local resident needs).

1 **Issue 23.** Whether the failure to provide reasonable access to valuable
2 minerals on forest resource lands without factual justification in the record fails
3 to meet the goal of the GMA to reasonably maintain and enhance the mineral
4 resource activity and protect property rights of companies which own such
5 lands. Goal 6 of the GMA, RCW 36.70A.020(6)? (Weyerhaeuser Statement of
6 issues A-I).

7 RCW 36.70A.020(6) provides:

8 Property rights. Private property shall not be taken for public use without just
9 compensation having been made. The property rights of landowners shall be
10 protected from arbitrary and discriminatory actions.

11 Segale's argument, from what the Board can discern, is the property rights of owners of
12 existing mineral operations who wish to expand and the owners of land with known mineral
13 resources have been impacted due to the County's failure to consider all of its lands for
14 designation.¹⁵⁶ In addition, Segale argues the record is devoid of any justification for
15 excluding parcels owned by the applicant.¹⁵⁷ Weyerhaeuser contends neither the record
16 nor the law supports the County's restriction on the use of its land due to the removal of the
17 dual designation provision pertaining to mineral and forest lands.¹⁵⁸ Weyerhaeuser further
18 asserts the limitation on dual designation is tantamount to a tax for which the County bears
19 the burden to show the restriction is reasonably necessary, a burden it failed to meet.¹⁵⁹

20
21 In response, the County states there is nothing preventing the re-designation of Forest Land
22 as Mineral Resource Lands.¹⁶⁰ Furthermore, the County argues the Thurston County Code
23 allows a property owner to extract mineral resources on its property for use on that property.
24 Finally, the County disputes the assertion it acted without factual justification in reaching the
25 decision to deny dual designation.¹⁶¹

26
27
28
29 ¹⁵⁶ Segale Opening Brief at 6

30 ¹⁵⁷ Id. at 9

31 ¹⁵⁸ Weyerhaeuser Prehearing Brief at 15

32 ¹⁵⁹ Id. at 15-16 (citing RCW 82.02.020, *Isla Verde v. City of Camas*, 146 Wn.2d 740 (2002); *Citizens Alliance v. Sims*, 145 Wn.App. 649 (2008).

¹⁶⁰ At the Hearing on the Merits the County addressed the process for first dedesignating Forest Lands and then redesignating the land as MRL.

¹⁶¹ Thurston County Response Brief, at 22-23

1 The Board views Weyerhaeuser's argument as primarily focusing on the constitutional
2 nature of the County's legislative action as it questions whether the adopted criteria, which
3 restricted use, were reasonably related to a legitimate governmental purpose or whether it
4 conforms to nexus and proportionality rules. The Board has previously articulated that
5 although Goal 6 opens with a statement related to the unconstitutional taking of property, it
6 has no authority to determine constitutional issues.¹⁶² The language relied upon by
7 Weyerhaeuser is grounded in holdings of the courts addressing constitutional issues.
8 Therefore, the Board's review of Goal 6 violations focuses on the second phrase and
9 considers whether the challenged action was arbitrary and discriminatory.
10

11
12 In reviewing such a challenge, the Board has stated that a petitioner must first articulate a
13 property right protected under law and then demonstrate the action is both arbitrary and
14 discriminatory.¹⁶³ The property right Weyerhaeuser argues has been impacted is the use of
15 its land for the extraction of mineral resource for off-site commercial purposes. Similarly,
16 Segale asserts a "use of land" argument but not just for itself but for undefined land owners.
17 The Board is well aware that the ability of a property owner to use property has been
18 recognized as a property right,¹⁶⁴ although the Board knows of no cases finding that a
19 property owner has the right to use property for any purpose it deems fit or which would
20 result in the greatest economic return.¹⁶⁵ In *Laurel Park*,¹⁶⁶ the Board stated there is no
21
22
23

24 ¹⁶² *Laurel Park v. City of Tumwater*, WWGMHB Case No. 09-2-0010, Final Decision and Order (October 13,
25 2009).

26 ¹⁶³ *OSF/CPCA v. Jefferson County*, WWGMHB Case No. 08-2-0029c, Final Decision and Order, at 43 (Nov.
27 19, 2008); *Hadaller, et al v. Lewis County*, WWGMHB Case no. 08-2-0004, Final Decision and Order, at 14-15
28 (July 7, 2008); *Bayfield Resources/Futurewise v. Thurston County*, WWGMHB Case No. 07-2-0017c, Final
29 Decision and Order, at 27 (April 17, 2008).

30 ¹⁶⁴ *Manufactured Housing Cmty's. v. State*, 142 Wn.2d 347, 364 (Wash. 2000) (Citing *Ackerman v. Port of*
31 *Seattle*, 55 Wn.2d 400, 409, 348 P.2d 664 (1960); *Guimont V. Clarke*, 121 Wn.2d 586, 595 (1993); *Robinson*
32 *v. City of Seattle*, 119 Wn.2d 34, 50, 830 P.2d 318 (1992); *Presbytery of Seattle v. King County*, 114 Wn.2d
320, 329-30 (1990); . *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378, 65 S. Ct. 357, 89 L. Ed. 311
(1945)).

Ackerman v. Port of Seattle, 55 Wn.2d 400, 409 (1960)(overruled on other grounds by *Highline School District*
No. 401 v. Port of Seattle, 87 n.2.

¹⁶⁵ See *Hadaller, et al v. Lewis County*, WWGMHB Case No. 08-2-0004c, Final Decision and
Order/Compliance Order (July 7, 2008)(Finding no property right in use based on economic value).

1 right to the continuation of zoning and therefore there is no dispossession of a property right
2 when there is a change in the zoning of property. A similar situation is present here in
3 relationship to the removal of the dual-designation language; therefore Weyerhaeuser has
4 not articulated a protected property right. To reiterate, whether or not this change in
5 permissible uses is “reasonably related to a legitimate governmental purpose” or fails in
6 regards to “nexus and proportionality” is for the courts, not the Board, to decide.
7

8 Segale’s property rights claim is unclear. Is there a protected property right in the
9 expansion of existing facilities? Do owners of known deposits have a protected right in the
10 future extraction of minerals, regardless of any change in land use designation/zoning?
11 Segale did not adequately convey to the Board what its legally-recognized protected
12 property right was or, for that matter, support that right with legal citation. Since Segale fails
13 to assert a legally protected property right, the Board’s review of this issue need go no
14 further.
15

16
17 Weyerhaeuser also sets forth argument based on RCW 82.02.020. The Board has
18 historically held it has no authority to determine compliance with RCW 82.02.020, not only
19 because it is not enumerated within the Board’s review authority¹⁶⁷ but because it is
20 grounded in constitutional principles.¹⁶⁸ Thus, the Board will not address this aspect of
21 Weyerhaeuser’s argument.
22

23 **Goal 8: Natural Resource Industries**

24 All of the Petitioners raised Issues alleging a violation of RCW 36.70A.020(8), the GMA’s
25 goal related to Natural Resource Industries.¹⁶⁹ The text of the issue statements has been
26
27
28

29 ¹⁶⁶ *Laurel Park Community v. City of Tumwater*, WWGMHB Case No. 09-2-0010, Final Decision and Order
30 (Oct. 13, 2009).

31 ¹⁶⁷ RCW 36.70A.280(1)

32 ¹⁶⁸ See e.g. *CRSP/Jepson, et al v. Whatcom County*, WWGMHB Case No. 08-2-0031, Order on Motions (Jan.
16, 2009); *Bussanich v. City of Olympia*, WWGMHB Case No. 09-2-0001, Order on Motions (April 1, 2009).

¹⁶⁹ As set forth in the Prehearing Order, Issues 1, 3, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, and 21 all contain an
allegation related to RCW 36.70A.020(8).

1 provided within the context of the Board's discussion related to GMA requirements and,
2 therefore, will not be repeated here.

3
4 The Natural Resource Industries goal provides:

5 Natural resource industries. Maintain and enhance natural resource-based industries,
6 including productive timber, agricultural, and fisheries industries. Encourage the
7 conservation of productive forest lands and productive agricultural lands, and
8 discourage incompatible uses.

9 Although the language of Goal 8 makes no express reference to mineral resources, the
10 language is non-exclusive and the mineral resource industry is indisputably a natural
11 resource industry since its very existence relies upon the geological deposits it extracts from
12 the land. Therefore, when considering amendments to its criteria for the designation of
13 mineral resource lands, Thurston County's actions were to be guided by this goal – with the
14 applicable guiding principle being the maintenance and enhancement of the industry.
15

16 Rather than repeat the Petitioners' argument presented in relationship to the mineral
17 resource land designation and protection issues, it is sufficient to summarize that Petitioners
18 contend the County's newly enacted designation criteria will not maintain and enhance the
19 mineral resource industry due to what they assert is its preclusive nature.
20

21
22 Although the Board does not discount the County's argument that it went to great lengths to
23 balance the GMA goals and not to prioritize one over others, as it is permitted to do,¹⁷⁰ prior
24 to engaging in a balancing act, the County first needed to meet the mandatory requirements
25 the GMA as they relate to mineral lands. The Board has found the Record fails to disclose
26 consideration of WAC 365-190 as required by RCW 36.70A.170(2). The Board can only
27 conclude the County was not guided by RCW 36.70A.020(8) which seeks to maintain and
28 enhance the mineral resource industry.
29
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¹⁷⁰ RCW 36.70A.3201
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1 **Goal 11**

2 WACA and Segale raised Goal 11 in Issue 4.

3 Goal 11 is the public participation goal and provides:

4 (11) Citizen participation and coordination. Encourage the involvement of
5 citizens in the planning process and ensure coordination between communities
6 and jurisdictions to reconcile conflicts.

7 The Board will not address Goal 11 as Issue 4 was previously dismissed.
8

9 Conclusion

10 The Board concludes the Petitioners have carried their burden of proof in demonstrating
11 Thurston County's action in adoption of Resolution No. 14401 and Ordinance No. 14402
12 were not guided by RCW 36.70A.020(8).
13

14 The Board concludes the Petitioners have failed to carry their burden of proof in
15 demonstrating Thurston County's action in adoption of Resolution No. 14401 and Ordinance
16 No. 14402 were not guided by RCW 36.70A.020(4), RCW 36.70A.020 (5), RCW
17 36.70A.020(6) and RCW 36.70A.020(11).
18
19

20 **VI. INVALIDITY**

21 Although none of the Petitioners raised an independent issue requesting a determination of
22 invalidity, Petitioners did request the imposition of invalidity in their Petitions for Review and
23 their briefing.¹⁷¹ All of the Petitioners' requests are premised on substantial interference
24 with Goal 8 - failing to maintain and enhance the mineral resource industry.¹⁷² The County
25 only indirectly responds to these requests by including statements throughout its brief that it
26 was, at all times, guided by and seeking to balance the Goals of the GMA.¹⁷³
27
28

29 The GMA's invalidity provision, RCW 36.70A.302(1), provides:
30

31 ¹⁷¹ Segale Prehearing Brief, at 25/PFR at 6; WACA Prehearing Brief, at 19/PFR at 10; Weyerhaeuser
32 Prehearing Brief, at 19/PFR at 8.

¹⁷² *Id.*

¹⁷³ See Thurston County's Prehearing Brief at pgs. 25, 25, 33, 34, 37, 41, 46 and 47 for examples.

1 (1) A board may determine that part or all of a comprehensive plan or development
2 regulation are invalid if the board:

- 3 (a) Makes a finding of noncompliance and issues an order of remand under
RCW 36.70A.300;
4 (b) Includes in the final order a determination, supported by findings of fact
5 and conclusions of law, that the continued validity of part or parts of the
6 plan or regulation would substantially interfere with the fulfillment of the
goals of this chapter; and
7 (c) Specifies in the final order the particular part or parts of the plan or
8 regulation that are determined to be invalid, and the reasons for their
9 invalidity.

10 Discussion

11 In the discussion of the Legal Issues in this case, the Board found and concluded that
12 Thurston County's adoption of Resolution No. 14401 and Ordinance No. 14402 was clearly
13 erroneous in regard to its MRL designation criteria and applicable development regulations
14 and resulted in violations of RCW 36.70A.170 and RCW 36.70A.172. These actions were
15 determined to be non-compliant because:
16

- 17 • Thurston County failed to consider WAC 365-190 Minimum Guidelines, as required
18 by RCW 36.70A.170(2), when developing its MRL designation criteria; and
19 • Thurston County failed to include Best Available Science in developing the minimum
20 designation criteria and implementing regulations affecting critical areas as required
21 by RCW 36.70A.172.
22

23 The Board further found and concluded that Thurston County's action was not guided by
24 RCW 36.70A.020(8), the Natural Resource Industries Goal. The Board is remanding
25 Resolution No. 14401 and Ordinance No. 14402 based on these non-compliant conclusions
26 with direction to the County to take legislative action to comply with the goals and
27 requirements of the GMA as set forth in this Order.
28

29
30 Invalidity is a discretionary remedy available to the Board when it determines the continued
31 validity of the challenged legislative enactment would substantially interfere with the
32 fulfillment of the GMA goals. Although the Board concluded Thurston County's actions were

1 not guided by Goal 8, this does not inevitably equate to substantial interference. Nothing
2 was presented to the Board that during the pendency of the compliance period, mineral
3 lands of long-term significance would be adversely impacted so as to result in a permanent
4 loss of those minerals for future extraction thereby substantially interfering with the
5 maintenance and enhancement of the industry. In addition, nothing was presented to the
6 Board that the demand for mineral resources in and from Thurston County could not be
7 satisfied by the mines currently in operation until such a time as the County adopts
8 compliant legislation. The Board recognizes Weyerhaeuser's argument in regards to the
9 expansion of the Columbia Quarry so as to meet the jetty-rock demands of Washington
10 State, specifically the US Army Corp of Engineers reconstruction of the Columbia River
11 jetties, and potential contractual obligations it would like to bid on so as to meet these
12 demands. However, this results in the County's actions substantially interfering with the
13 fulfillment of Weyerhaeuser's business goals, not the GMA's, and nothing presented to the
14 Board establishes the quarry does not currently have the resources to meet the demand
15 until the compliance period has expired. Therefore, the Board declines to enter a
16 Determination of Invalidity for Thurston County Resolution No. 14401 and Ordinance No.
17 14402.
18
19
20

21 VII. ORDER

22 Based upon the foregoing, Thurston County is ordered to bring its Comprehensive Plan/
23 Development Regulations into compliance with the Growth Management Act pursuant to
24 this decision within 180 days. The following schedule for compliance shall apply:
25

26 Compliance Due on identified areas of	November 21, 2011
27 noncompliance	
28 Compliance Report/Statement of Actions Taken	December 5, 2011
29 to Comply and Index to Compliance Record	
30 Objections to a Finding of Compliance	December 19, 2011
31 Response to Objections	December 29, 2011
32 Compliance Hearing - Telephonic	January 5, 2012
(360) 407-3780 pin 681184#	10:00 a.m.

1 So ORDERED this 17th day of June, 2011.

2
3 _____
4 William Roehl, Board Member

5
6 _____
7 Nina Carter, Board Member

8
9 _____
10 James McNamara, Board Member

11 Pursuant to RCW 36.70A.300 this is a final order of the Board.¹⁷⁴
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28 ¹⁷⁴ Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as
29 provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court
30 according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition
31 for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney
32 General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the
Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the
Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board
by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)